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In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TOTHE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 98-6222, 98-2589, 98-4675, 98-6414,
98-6430, 98-6431, 98-6442, 98-6458,
98-6476 to 98-6478, 98-6485 and 98-6486

GULF POWER COMPANY; ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

TAMPA ELECTRIC COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

COMMONWEALTH EDISON COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

TEXAS UTILITIES ELECTRIC COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

UNION ELECTRIC COMPANY, D.B.A. AMERENUE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN ELECTRIC POWER SERVICES CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DUKE ENERGY CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

VIRGINIA ELECTRIC AND POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

CAROLINA POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DUQUESNE LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DELMARVA POWER AND LIGHT, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

April 11, 2000

Before: TJOFLAT and CARNES, Circuit Judges, and GARWOOD,* Senior Circuit Judge.

TJOFLAT, Circuit Judge:

The 1996 Pole Attachment Act, 47 U.S.C. § 224 (Supp. II. 1996) (the "1996 Act"), gives providers of cable and telecommunications services the right to attach wires to the poles of power and telephone companies. If the power and telephone companies will not accept the rent the providers offer to pay, the Federal Communications Commission (the "FCC" or "Commission") sets the rent. In *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 1998 WL 46987 (1998) (codified at 47 C.F.R. §§ 1.1401-1.1418 (1999) 47 CFRS1.1418 CFRLQ) ("*Report and Order*"), the FCC promulgated a formula for computing that rent. The FCC also ruled (in the *Report and Order*) that the 1996 Act precluded utilities (power and telephone) from receiving rent for wires that were "overlashed" to wires previously attached to their poles;[1] that the 1996 Act gave it authority to regulate the placement of wireless com-

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* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] Overlashing occurs when an attacher physically ties additional cables to cables already attached to a pole. *See Report and Order*, 13 F.C.C.R. 6777, 6805, 1998 WL 46987 (1998).

munications equipment and attachments for Internet service on utility poles; and that the Act precluded utilities from receiving rent for unused wires contained within fiber optic cables, "dark fiber,[2]" attached to the poles.

In these consolidated petitions for review of the *Report and Order*, several power companies[3] (the Petitioners") challenge the FCC's formula for determining rent on the ground that, when implemented, the formula will operate to take their property without just compensation, in violation of the Fifth Amendment. We decline to reach this takings claim, because it is not ripe. The Petitioners also challenge the FCC's other rulings. As to those rulings, we find unripe their challenge to the overlashing provision of the *Report and Order*; we hold that the FCC lacks authority to regulate the placement of wireless equipment on utility poles and attachments for Internet service; and that its decision regarding dark fiber constitutes a reasonable interpretation of the 1996 Act.

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[2] Dark fiber is "bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity." *Report and Order*, 13 F.C.C.R. at 6810.

[3] The utilities involved in this proceeding either as petitioners or intervenors are Gulf Power Company, Alabama Power Company, Georgia Power Company, Southern Company Services, Tampa Electric Company, Potomac Electric Power Company, Virginia Electric & Power Company, Carolina Power & Light Company, Duquesne Light Company, Delmarva Power & Light Company, Public Service Electric & Gas Company, Houston Lighting & Power Company, Texas Utilities Electric Company, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Union Electric Company, and Florida Power and Light Company.

I.

A.

From its inception, the cable television industry has attached its cables to the utility poles of power and telephone companies.[4] They have done so because factors such as zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible. Despite this dearth of alternatives, the attachment agreements between cable television companies and utility companies have generally been voluntary. But, the lack of alternatives has given the power and telephone companies an advantage in negotiating attachment agreements: their monopoly in the supply of poles that could accommodate television cables has allowed them, in the past, to charge monopoly rents.

In an effort to solve the monopoly pricing problem, Congress, in 1978, enacted the Pole Attachment Act, Pub. L. 95-234, 92 Stat. 33 (1978) (codified at 47 U.S.C. § 224 (1994)) (the "1978 Act"), as an amendment to the Communications Act of 1934. The solution Congress articulated in that act was to specify a range of rents telephone and power companies could charge the cable television companies they allowed to attach to their

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[4] In 1978, when Congress decided to intervene as described in the text *infra*, approximately 95 percent of cable television wires were attached to utility poles because cable television companies owned less than 10,000 poles, compared to over ten million poles owned by the power and telephone companies. *See* S. Rep. No. 95-580, at 12-13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-21.

poles.[5] Congress' solution, in the 1978 Act, did not, however, change the voluntary nature of the attachment arrangement. As before, the cable television companies had no right to attach; thus, utilities could reject a cable television company's offer to attach. As for the attachments already in place, the 1978 Act effectively changed their terms.[6] In the event the parties could not agree to the rent and conditions of an attachment, and the State chose not to regulate the terms of attachments, the FCC would settle the issue.[7]

The rule the FCC promulgated to implement its authority under the 1978 Act reflected its limited authority; that rule merely "provided complaint and enforcement procedures to ensure that rates, terms and

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[5] Congress expressed this range as:

> [N]ot less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1) (1994). This range is more commonly expressed as not less than the incremental cost of adding a particular attachment, nor more than the fully allocated costs of the pole.

[6] Since the 1978 Act did not give the cable television companies the right to attach, the utilities could have avoided the FCC's regulation of rent and conditions of attachment under the Act by canceling the existing arrangements, and having the attachments removed. For obvious reasons, the utilities did not take this step.

[7] The FCC already possessed regulatory authority over the telephone industry. *See* 47 U.S.C. § 151 (1994). The passage of the 1978 Act gave the FCC the authority to regulate power companies as well, albeit in the limited manner described in the text. *See* 47 U.S.C. § 224(a)-(c) (1994).

conditions for cable television pole attachments [we]re just and reasonable." 47 C.F.R. § 1.1401 (1978). The rule set forth (1) the procedure for filing a complaint about rents or conditions of attachment, *see i d.*; (2) factors to be considered by the administrative law judge in determining the lawfulness of the rent or conditions the utility sought, *see id.*; and (3) a formula for determining the maximum rent the utility could receive, *see* 47 C.F.R. § 1.1409. Under the formula, the maximum rent a utility could charge was the attacher's proportionate share[8] of the bare costs of maintaining the pole and the "carrying charges"[9] associated with the pole.

After the FCC promulgated its rule, several cable television companies in Florida filed complaints with the FCC, contending that Florida Power Corporation was charging them unreasonable rents to attach. *See FCC* v. *Florida Power Corp.*, 480 U.S. 245, 248-49, 107 S. Ct. 1107, 1110, 94 L.Ed.2d 282 (1987). The FCC agreed that the rents were unreasonable and set a lower rent. Florida Power appealed the FCC's decision to this court, which held that the rent the FCC had set

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[8] The attacher's proportionate share equaled the amount of space occupied by the attacher divided by the amount of total "usable space."

[9] The FCC regulations do not define carrying charges, but according to *Black's Law Dictionary*, they are "[e]xpenses incident to property ownership, such as taxes and upkeep." *Black's Law Dictionary* 205 (7th ed. 1999). The Department of Agriculture's regulations define carrying charges as incidental costs associated with storing a commodity before delivery under a sales contract, see 7 C.F.R. § 1488.2(f) (1999), and the Securities and Exchange Commission defines them in the leverage contract context as service and interest charges, see 17 C.F.R. § 31.4(*l*) (1999).

effected a taking of Florida Power's property without just compensation. *Florida Power Corp.* v. *FCC*, 772 F.2d 1537, 1546 (11th Cir. 1985). The Supreme Court reversed, holding that no taking occurred because Florida Power had voluntarily agreed to the cable companies' attachments. Had Congress, in the 1978 Act, required utilities to allow the attachments, a taking may have occurred, the court suggested. *See Florida Power Corp.*, 480 U.S. at 251 n.6, 107 S. Ct. at 1111 n.6.

The *Florida Power* decision clarified two fundamental precepts underlying the 1978 Act and the FCC's implementing regulations: (1) the FCC had narrow authority under the 1978 Act; it could regulate the power companies only to ensure that, once they consented to an attachment, the conditions of attachment and the rent they were to receive were reasonable; and (2) the FCC's rent formula was not subject to judicial review under the Fifth Amendment's Takings Clause because the 1978 Act's voluntary attachment provision effected no taking for which just compensation would be due.

Not long after the Court decided *Florida Power*, Congress decided to foster competition in the cable television industry. To that end, it enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-559 (1994)) (the "Cable Act"). Prior to this enactment, cable television companies operated under exclusive franchises granted by a local government, usually a municipality. Because these franchises effectively gave the companies monopolies in the franchise territory, the local governments regulated the rates they could charge subscribers. *See* H.R. Rep. No. 98-934, at 23-24,

reprinted in 1984 U.S.C.C.A.N. 4655, 4660-61.[10] The approach Congress adopted to encourage competition was to eliminate the power of local governments to set rates for "basic" cable service. Congress realized that, in the short run at least, this would give incumbent cable operators the ability to charge their subscribers monopoly prices. Prices would decrease in the long run, however, as local governments granted additional franchises for a given territory. *See Johnson Enters., Inc.* v. *FPL Group, Inc.*, 162 F.3d 1290, 1296 (11th Cir. 1998). New cable companies would be able to enter the market and compete with the incumbent cable company though, only if they could obtain utility pole attachments on the same terms as those given to the incumbent.

In addition to these new demands for pole space, a host of new telecommunications carriers (such as new long distance telephone carriers and wide area telephone service providers), which used wires to carry their signals, began calling on the power and telephone companies to lease them space. They did so because utility poles afforded the only feasible means for stringing their wires. Since the 1978 Act only regulated the rents utilities could charge cable television companies, many utilities demanded monopoly rents from telecommunications carriers. In an effort to alleviate this problem, Congress, in 1996, amended the 1978 Act to give entities providing telecommunications and cable television service the right to "nondiscriminatory

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[10] The local governments set the rates the cable companies could charge subscribers for "basic" services. Some states and the FCC set the rates the companies could charge for other services, such as Home Box Office. *See* H.R. Rep. No. 98-934, at 24 (1984); *reprinted in* 1984 U.S.C.C.A.N. at 4661.

access" to utility poles. *See* 47 U.S.C. § 224(f) (Supp. II 1996).[11] In the event the parties could not agree to the terms of the attachment, including the rent, the 1996 Act authorized the FCC to set "just and reasonable" terms. *See id.* § 224(b)(1).

The 1996 Act also (1) redefined "utility," changing the definition from "any person whose rates or charges are regulated by the Federal Government or a State" to "any person who is a local exchange carrier, or a electric, gas, water, steam, or other public utility;"[12] (2) redefined "pole attachment" to include attachments by providers of telecommunications service;[13] (3) directed

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[11] Section 224(f) provides:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

[12] Both definitions of "utility" also require the ownership of poles, used at least in part, for wire communication. *Compare* 47 U.S.C. § 224(a)(1) (1994), *with* 47 U.S.C. § 224(a)(1) (Supp. II 1996). Thus, if an entity's poles do not have attachments that are transmitting "writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable or other like connection," 47 U.S.C. § 153(51) (Supp. II 1996), the entity is not a utility for purposes of the Act.

[13] *Compare* 47 U.S.C. 224(a)(4) (1994), with 47 U.S.C. § 224(a)(4) (Supp. II 1996). The 1996 version of the Act defined telecommuni-

the FCC to create a formula for determining the attachment rent a utility could charge a telecommunications service provider;[14] and (4) instructed utilities on how to apportion the costs of "unusable" and "usable" space on their poles among telecommunications service providers.[15]

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cations, telecommunications carrier, and telecommunications service as follows: "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153(43) (Supp. II 1996); "telecommunications carrier" is any provider of telecommunications services, 47 U.S.C. § 153(44) (Supp. II 1996); "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used," 47 U.S.C. § 153(46) (Supp. II 1996).

[14] *See* 47 U.S.C. § 224(e)(1) (Supp. II 1996). For purposes of this opinion, the term "telecommunications service providers" includes cable television companies that provide telecommunications services in addition to cable services.

[15] *See* 47 U.S.C. § 224(e)(2), (3) (Supp. II 1996). Section 224(e)(2) requires utilities to apportion the costs of "unusable space" as follows:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

Section 224(e)(3) requires utilities to apportion the costs of "usable space" as follows:

> A utility shall apportion the costs of providing usable space among all entities according to the percentage of usable space required for each entity.

On February 6, 1998, the FCC promulgated regulations implementing its authority under the 1996 Act. *See Report and Order*, 13 F.C.C.R. 6777, 1998 WL 46987. In the *Report and Order*, the FCC interpreted section 224(f) of the 1996 Act to require that utility companies give Internet providers access to their poles because the Internet was a cable service. *See id.* at 6795-96. Further, it interpreted the language of section 224(a)(4), which states that pole attachment meant *any* attachment, and section 224(d)(3), which provides that the FCC's rate applied to *any* attachment by a telecommunications carrier, to mean that telephone and power companies would have to accept pole attachments for wireless telephone equipment. *See id.* at 6798-99; *see also infra* n.22. The agency also determined that the Act precludes utilities from receiving rent for overlashed wires unless those wires significantly increase the burden on the pole. *See id.* at 6807. Finally, the FCC interpreted the Act to prohibit utilities from receiving rent for dark fiber. *See id.* at 6810.

Having thus interpreted the scope of its authority, the FCC articulated formulas for determining the attachment rents utilities may charge telecommunications service providers. *See id.* at 6820-30. Until February 2001, the 1978 Act's maximum rent formula for cable providers applies to attachments by telecommunications service providers. After that, the maximum rent will equal the sum of the "unusable" and "usable" rate factors.[16]

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[16] For poles, the "unusable space" factor = 2/3 x (the percentage of the total pole space that is unusable) x (the attacher's share of the bare costs of maintaining the pole) x (carrying charges). The "usable space" factor = (the percentage of total

In this amended rule, the FCC incorporated almost verbatim the complaint process articulated in its 1978 rule. *See* 47 C.F.R. §§ 1.1404, 1.1409 (1999). If the parties cannot agree to the rent or other terms of an attachment (or if the utility denies access to its poles), the party contending that the rent or other terms are unjust and unreasonable may petition the Commission to settle the matter. That party bears the burden of establishing a *prima facie* case that the other party's position is unjust and unreasonable.[17] If the complainant fails to make out a *prima facie* case, the FCC must dismiss its complaint, in which case the rent or conditions offered or demanded govern the transaction.[18] If a *prima facie* case is established, the Commission determines the *maximum* just and rea-

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usable space occupied by the attacher) x (the percentage of total pole space that is usable) x (net costs of the bare pole) x (carrying charges). For conduits, the "unusable space" factor = 2/3 x (net linear costs of unusable space divided by the number of attachers) x (carrying charges). The "usable space" factor for conduits = 1/2 x (1 duct divided by the average number of ducts less adjustments for maintenance ducts) x (linear cost of usable conduit space) x (carrying charges). 47 C.F.R. §§ 1.1417, 1.1418 (1999); *Report and Order*, 13 F.C.C.R. at 6820-33.

[17] For example, if the party seeking attachment complains that the utility is demanding an unreasonable rent (*i.e.*, more than the maximum allowed under the FCC's formula), it bears the burden of proving that the rent demanded is more than the fully allocated costs of the pole.

[18] It is possible that the Commission's disposition of a complaint—whether a dismissal or an order setting one or more terms—may turn out to be provisional if, after the decision issues, the putative attacher decides to withdraw its request for an attachment. In this opinion, we assume for sake of discussion that the putative attacher does not withdraw its request and abides by the Commission's decision.

sonable rent allowed under the rule's formula. Then, it decides the specific just and reasonable rent the complainant should pay or receive for the attachment. This determination involves reviewing items such as costs, rate of return on investment, the utility's filings before state or federal regulatory agencies, and engineering studies, see 47 C.F.R. § 1.1404(g)(1)-(13) (1999), in addition to considering the maximum rent the FCC's formula yields. The FCC's final rate order, like any of its final orders, is then subject to judicial review under 47 U.S.C. § 402(a) (1994) (providing for judicial review of FCC orders) and 28 U.S.C. §§ 2342, 2344 (1994) (providing for judicial review of FCC orders in a United States Court of Appeals).

B.

In response to the FCC's *Report and Order*, power companies across the country filed petitions for review in various courts of appeals. On March 23, 1998, Gulf Power Company, Alabama Power Company, Georgia Power Company, and Southern Company Services filed a joint petition for review in the Eleventh Circuit Court of Appeals. On April 28, 1998, Florida Power & Light Company also filed a petition for review in the Eleventh Circuit. Subsequently, on May 8, 1998, Tampa Electric Company filed a petition for review in the Eleventh Circuit, and Potomac Electric Company filed a petition for review in the D.C. Circuit. The same day, Virginia Electric & Power Company, Duke Energy Company, and Carolina Power & Light Company filed petitions for review in the Fourth Circuit; Duquesne Light Company and Delmarva Power & Light Company filed in the Third Circuit; American Electric Power Service Corporation filed in the Sixth Circuit;

Commonwealth Edison Company filed in the Seventh Circuit; and Union Electric Company filed in the Eighth Circuit. Finally, on June 17 and July 16, 1998, respectively, Houston Lighting & Power Company and Public Service Electric & Gas Company filed motions to intervene in the first case filed in the Eleventh Circuit. Their motions were granted on August 4, 1998, the same day we granted the FCC's motion to consolidate all of the petitions for review.

In their petitions for review, the Petitioners challenge (1) the implementation of the FCC's formula for computing attachment rents as a taking without just compensation; (2) the implementation of the FCC's overlashing interpretation as a taking without just compensation; (3) the FCC's authority to include wireless communications equipment within the 1996 Act's regulated rate framework; (4) the FCC's authority to include Internet service providers within the 1996 Act's regulated rate framework; and (5) the FCC's decision not to count dark fibers as separate attachments. We discuss each of these challenges below, in parts III-VI.

On the day Gulf Power Company and its co-plaintiffs filed their joint petition for review, Gulf Power and several other utilities[19] brought an action in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief. *See Gulf Power Co.* v. *United States*, 998 F. Supp. 1386 (N.D. Fla. 1998). Contending that the range of rental compensation the 1996 Act provided would in every case operate to deny a utility just compensation, these

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[19] The other utilities were Alabama Power Company, Georgia Power Company, Duke Power Company, Mississippi Power Company, Ohio Edison Company, and Florida Power Corporation.

plaintiffs sought a declaration that the 1996 Act was facially invalid under the Fifth Amendment Takings Clause, and a permanent injunction prohibiting the Commission from enforcing the 1996 Act. *See id.* at 1389. The plaintiffs also claimed that allowing the FCC to determine just compensation violated the Separation of Powers doctrine. The district court granted the United States' motion for summary judgment. It concluded that, although the 1996 Act authorized a taking of the plaintiffs' property, it did not deny the plaintiffs just compensation. Rather, it provided a procedure—a proceeding before the Commission—for determining just compensation which did not violate the Separation of Powers doctrine because the Commission's decision was subject to judicial review. *See id.* at 1397- 98.

The plaintiff utilities appealed. A panel of this court upheld the district court's conclusion that the 1996 Act authorized a taking of the plaintiffs' property, but declined to review the court's ruling on just compensation. That issue was not ripe for review because the plaintiffs had not shown that the 1996 Act would operate to deny them just compensation in every case. *See Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1338 (11th Cir. 1999) (*Gulf Power I*). Finally, the panel affirmed the district court's holding that allowing the FCC to determine just compensation in the first instance did not violate the Separation of Powers doctrine. *Id.* at 1332- 37.

II.

In their petitions for review, the Petitioners do not present the same challenges the plaintiffs made in *Gulf Power I*. Instead of attacking the facial validity of the Act under the Fifth Amendment Takings Clause and

the Separation of Powers doctrine, the Petitioners question the facial validity of several aspects of the FCC's *Report and Order.*

We review constitutional challenges to agency regulations *de novo. See Rural Tel. Coalition* v. *FCC*, 838 F.2d 1307, 1313 (D.C. Cir. 1988); *see also* 5 U.S.C. § 706(2)(B) (1994). We use the two-step *Chevron* analysis to review agency interpretations of a statute. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984); *Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997). Under *Chevron* step one, we determine whether Congress has spoken unambiguously to the question at issue. If it has, our inquiry ends; we give effect to Congress' intent. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781. Under *Chevron* step two, if we determine that Congress' intent is ambiguous, we defer to a reasonable agency interpretation of Congress' intent. *See id.* at 843, 104 S.Ct. at 2781-82. In resolving whether an ambiguity exists, we use normal tools of statutory construction, without affording agency interpretations any deference. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S. Ct. 1207, 1221, 94 L.Ed.2d 434 (1987); *National Mining Ass'n* v. *Secretary of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998).

III.

The Petitioners' primary challenge to the FCC's *Report and Order* is that the rate formula it establishes cannot pass muster under the Fifth Amendment Takings Clause. The Petitioners' challenge presents two separate questions: will the Commission's formula, when implemented, effect a taking of part of utility

poles, and if so, will the formula operate to deny the utilities just compensation in every case.

The *Gulf Power I* panel decided that the 1996 Act authorized a taking of utilities property, but concluded that the issue of whether the statute would operate to deny just compensation in every case was not ripe for review. *See Gulf Power I*, 187 F.3d at 1338; *see also Abbott Lab.* v. *Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). The panel's resolution of the takings issue constitutes binding precedent. *See Cargill* v. *Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997). We therefore begin with the premise that the 1996 Act authorizes the Commission, when faced with a complaint filed by an entity providing cable television or telecommunications services, to take a utility's property. Thus, our answer to the first question the Petitioners pose is yes: when the Commission rules on a complaint, a taking may result.

The second question the Petitioners present is whether the Commission's formula will operate to deny utilities just compensation in every case. The *Gulf Power I* panel held that the just compensation question, when raised in a facial challenge to the 1996 Act, was not ripe unless the plaintiffs could show that just compensation would be denied in all cases. The compensation limits—the maximum and minimum rents—that the Commission's rule prescribes mirror the compensation limits prescribed by the 1996 Act. *Compare* 47 U.S.C. § 224(b), (d)(1), *with* 47 C.F.R. § 1.1409. Under the 1996 Act, the lowest rent that may be considered just and reasonable is an amount equal to the incremental cost of adding the new attachment to the utility's pole; the highest rent that may be considered

just and reasonable is an amount equal to the fully allocated costs of the pole. *See* 47 U.S.C. § 224(b), (d)(1). A rent that is higher or lower than these statutory limits would be unjust and unreasonable. Because the outer boundaries of the FCC's formula are identical to those of the 1996 Act, *Gulf Power I's* ripeness standard binds us. Thus, we inquire whether the Petitioners have shown that the Commission's formula will always deny utilities just compensation.

In this case, we are not called upon to review an FCC determination that a utility provide pole space at a rent that does not amount to the just compensation mandated by the Takings Clause. All that is before us is a facial attack on the Commission's formula and the Petitioners' allegation that factors the Commission took into account in fashioning the formula could never provide just compensation. This is essentially the same argument the utilities made to the *Gulf Power I* panel. The panel's response was that the utilities failed to establish that "'no set of circumstances exists under which the Act would be valid.'" *Gulf Power I*, 187 F.3d at 1336 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)). Although the Petitioners posit circumstances in which the FCC's formula will deny just compensation, we are not confident, given the record at hand, that the formula will deny just compensation in all cases. The Petitioners' facial challenge to the formula is therefore unripe, and we do not address it. *Gulf Power I*, 187 F.3d at 1338; *Cargill*, 120 F.3d at 1386.[20]

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[20] For the same reasons, the issue of whether mandatory overlashing effects a taking without just compensation is also not ripe for review. Utilities, under the FCC's rule, are required to

IV.

The Petitioners challenge the FCC's decision to include wireless carriers within the "nondiscriminatory access" provision of section 224(f), claiming that the FCC has no statutory authority to regulate wireless carriers under the 1996 Act.[21] We agree.

The FCC contends that Congress' frequent use of the word "any" in the 1996 Act indicates an intent to have the Commission broadly regulate pole attachments.[22]

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allow overlashing of cables for no additional compensation unless the additional cables "significantly increase the burden on the pole." *Report and Order*, 13 F.C.C.R. at 6807. This regulatory exception essentially reflects the exception, sometimes called the "engineering and safety exception," present in the Act. *See* 47 U.S.C. § 224(f)(2). That exception did not prevent the *Gulf Power I* panel from finding that the 1996 Act authorized a taking, and neither does the regulatory exception prevent us from concluding that the FCC's overlashing rule authorizes a taking. Just compensation was too abstract to determine for the original statutory taking, and thus is also too abstract to determine for the taking authorized by the FCC's overlashing rule. *See Gulf Power I*, 187 F.3d at 1338; *see also Abbott Lab.*, 387 U.S. at 148-49, 87 S. Ct. at 1515.

[21] As stated in part II *supra*, questions of pure statutory construction fall within a *Chevron* step one analysis. We therefore owe no deference to an agency's construction of a statute. *See Cardoza-Fonseca*, 480 U.S. at 446, 107 S. Ct. at 1221; *National Mining Ass'n*, 153 F.3d at 1267.

[22] Specifically, the FCC cites Congress' use of the word "any" in the following two provisions:

> The term "pole attachment" means *any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

47 U.S.C. § 224(a)(4) (emphasis added).

As long as an attachment is made by a cable television company or a telecommunications service provider, the FCC contends, the attachment may be regulated under section 224(d) or (e), no matter what kind of attachment it is. This position is contrary to the Commission's narrow authority to regulate power companies. The FCC's organic statute does not give it authority to regulate power utilities. *See* 47 U.S.C. § 151 (1994) (creating the FCC to regulate interstate and foreign commerce in radio and wire communication). Congress placed power companies within the agency's regulatory authority for pole attachment purposes only. *See* 47 U.S.C. § 224(a)(1).

Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." A utility, according to section 224(a)(1) is "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[23] Read in combination, these two

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> This subsection shall apply to the rate for *any* pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for *any* pole attachment used by a cable system or *any* telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide *any* telecommunications service.

47 U.S.C. § 224(d)(3) (emphasis added).

[23] The term "wire communications" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds *by aid of wire, cable, or other like connection* between the points of origin and reception of such transmission, including all instru-

provisions give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and by negative implication does not give the FCC authority over attachments to poles for *wireless* communications.[24]

That wires are integral to the FCC's authority is supported by the legislative history of the 1978 Act.[25]

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mentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(51) (emphasis added).

[24] The fact that power companies that do not use their poles to transmit wire communications are not covered by the Act and the FCC's implementing regulations, *see supra* nn.12 & 23, further supports this narrow reading of the FCC's authority. The dissent takes issue with this reading of section 224, stating that we make more of the wire-based definition of utility than Congress intended. The dissent's reasoning is contrary to its own suggestion that we follow the straightforward statutory language of section 224. The language of section 224 plainly says that attachments may be made to poles used for wire communications; it says nothing about attachments for wireless communications.

[25] The statutory language of section 224 itself prohibits the FCC from regulating pole attachments for wireless communications; thus, we may end our review with that language. An understanding of the communications industry and Congress' attempts at regulating it helps one understand why Congress wrote section 224 to prohibit the FCC from regulating wireless communications. To provide this understanding, we use normal tools of statutory construction and eliminate any hint of ambiguity in the statutory language. *See Cardoza-Fonseca*, 480 U.S. at 432 n.12, 107 S. Ct. at 1213 n. 12 ("As we have explained, the plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.") (quoting *United States* v. *James*, 478 U.S. 597,

Congress' reason for passing it was that the Commission did not believe it had authority to regulate power companies since pole attachment arrangements "d[id] not constitute communication by wire or radio." S. Rep. No. 95-580, at 14, *reprinted in* 1978 U.S.C. C.A.N. at 122 (internal quotation marks omitted). The FCC reasoned that:

> The fact that cable operators ha[d] found in-place facilities convenient or even necessary for their businesses [wa]s not sufficient basis for finding that the leasing of those facilities [wa]s wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

Id. Before 1978, the FCC's regulatory authority did not extend to power companies because power companies did not use their poles primarily for communication by wire or radio. This hindered the growth of the cable television market. The FCC could regulate what telephone companies charged to attach, but could not regulate what the power companies charged to attach. Because telephone and power poles generally did not run side-by-side, the cable companies at times were forced to attach to power company poles instead of telephone poles, and to pay monopoly rents. To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella, permitting "[f]ederal involvement in pole attachments

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606, 106 S. Ct. 3116, 3121, 92 L.Ed.2d 483 (1986)); *see also infra* n.39 (Carnes, J., dissenting).

matters . . . where space on a utility pole ha[d] been designated and [wa]s *actually being used for communications services by wire or cable.*" *Id.* at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (emphasis added). The reason Congress gave this pole attachment authority to the FCC was that the Commission already regulated all other aspects of the cable industry and cable companies were the only entities seeking to attach to poles in 1978.

In 1996, when Congress amended the 1978 Act, it once again expanded the FCC's jurisdiction; this time to include attachments by telecommunications service providers. Nothing in the legislative history indicates that the original purpose behind regulating utility poles—to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck[26] facilities—changed. Rather, the legislative history suggests the same thing the language alteration suggests: Congress wanted to allow telecommunications service providers, like the cable television companies before them, to attach to the utilities' bottleneck facilities without having to pay monopoly rents. *See* H. Rep. No. 104-204, at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

The Petitioners' poles are not bottleneck facilities for wireless carriers. Wireless attachments to poles "include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." *Report and Order*, 13

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[26] *See AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. 366, 388, 119 S. Ct. 721, 734, 142 L.Ed.2d 835 (1999) (defining bottleneck facilities as something akin to essential facilities of antitrust law).

F.C.C.R. at 6799. Most of this equipment can be placed on any tall building, and the whole set-up requires more physical space then a wireline system. Further, wireless systems operate in a completely different way than do wireline systems. Wireline networks transmit through linear networks of cables strung between poles. Wireless networks, on the other hand, transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions. Indeed, it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question is that utility poles are not bottleneck facilities for wireless systems. Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers.[27]

Although Congress did not give the FCC authority to regulate the placement of wireless carriers' equipment under section 224 (or any other section) of the Telecommunications Act of 1996, that statute did address, in part, such regulation by state and local governments. Section 332[28] states that "[t]he regulation of the placement, construction, and modification of personal wireless services facilities by any State or local government

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[27] The FCC seemed to recognize that this might be the case when it stated that, "[t]here are potential difficulties in applying the Commission's rules to wireless pole attachments." *Report and Order*, 13 F.C.C.R. at 6799.

[28] The wireless communications section of the Telecommunications Act of 1996 follows the pole attachment section; as codified, however, the two sections do not follow one another. *Compare* Pub. L. No. 104-104, §§ 703, 704, 110 Stat. 149 (1996), with 47 U.S.C. §§ 224, 332 (Supp. II 1996).

or instrumentality thereof—shall not unreasonably discriminate among providers of functionally equivalent services; and shall not prohibit or have the effect of prohibiting the provision of personal wireless service." Pub. L. No. 104- 104, § 704(B)(i)(I),(II), 110 Stat. 149 (1996) (codified at 47 U.S.C. § 332(7)(B)(i)(I), (II)). The section goes on to require a state to act on requests to site wireless equipment within a reasonable time, to require a state to put its reasons for denying any such request in writing, and to limit the reasons a state can assert for determining where wireless carriers can locate their equipment. *See id.* § 704(B)(ii)-(iv) (codified at 47 U.S.C. § 332(7)(B)(ii)-(iv)). The specificity with which Congress addressed the siting of wireless equipment in section 332 indicates that it did not intend that section 224 provide the FCC authority to regulate the placement of wireless carriers' equipment.

V.

Next, Petitioners challenge the FCC's statutory authority to regulate attachments for Internet service under the 1996 Act. As with wireless carriers, we agree that the FCC has no authority under that act to regulate Internet service providers. The 1996 Act allows the Commission to regulate the rates for cable service and telecommunications service; Internet service is neither.

The FCC argues that Internet service provided by a cable television system is either "solely cable services" or is subject to regulation under section 224(b)(1)'s mandate to "ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable." *Report and Order*, 13 F.C.C.R. at 6795-96 (internal quotation marks omitted). To accept this argument

requires us to disregard the unambiguous language of the 1996 Act, which we cannot do. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340-41, 117 S. Ct. 843, 846, 136 L.Ed.2d 808 (1997). The 1996 Act calls for the Commission to establish two rates for pole attachments.[29] One, described in section 224(d), applies to "any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3). The second rate applies to "charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). For the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service.

Cable service, defined in section 522, is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6)(A), (B)(1994 & Supp. II 1996).[30] The only difference between this definition of

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[29] The dissent contends that our reading of section 224 ignores subsection (b)(1)'s mandate that the FCC provide just and reasonable rates for pole attachments. To the contrary, our reading gives effect to all parts of section 224 while the dissent's reading ignores the fact that subsections (d) and (e) narrow (b)(1)'s general mandate to set just and reasonable rates. The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized.

[30] Although section 522 states that its definitions apply only to that subchapter, we give words a consistent meaning throughout

"cable service" and the definition included in the 1978 Act is the addition of the words "or use." According to the House Report accompanying the 1996 amendments, the inclusion of the words "or use" was meant to "reflect[ ] the evolution of video programming toward interactive services." H. Rep. No. 104-204, at 97, *reprinted in* 1996 U.S.C.C.A.N. at 64. This is the only sentence in the legislative history that attempts to explain Congress' change to the definition of "cable service." Although what it means to reflect an evolution of video programming toward interactive service is not exactly clear, it is clear from Congress' lack of discussion of this change that it was minor in both language and intent. If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor change to effectuate a major statutory shift. *See Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 318, 105 S. Ct. 3180, 3187, 87 L.Ed.2d 220 (1985) (stating that without substantive comment "it is generally held that a change during codification is not intended to alter the statute's scope") (citing *Muniz* v. *Hoffman*, 422 U.S. 454, 467-74, 95 S. Ct. 2178, 2185-89, 45 L.Ed.2d 319 (1975)). How then did the addition of the words "or use" alter the definition of "cable service"? The statute's plain language and Congress' one sentence explanation suggest

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the statute unless otherwise instructed by Congress. *See Richards* v. *United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.") (footnotes and internal quotations omitted); *Nipper* v. *Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994).

that Congress expanded the definition to include services that cable television companies offer to their customers to allow them to interact with traditional video programming.[31]

Although the statute includes interaction with other programming—in addition to video programming—within the definition of "cable service," we cannot read the language "other programming" broadly to include Internet services. "Other programming" has been part of the definition of "cable service" since 1978, when the Internet was only a tool for researchers and the military, not a commodity that would require regulation. When Congress used this language then, it could not have intended it to cover Internet services provided by cable companies. Again, we will not radically expand the scope of the definition of "cable service" from a video base to an all-interactive-services base without some substantive indication from Congress that this is

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[31] Video programming means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20).

indeed its intent. *See Walters*, 473 U.S. at 318, 105 S. Ct. at 3187.[12]

Furthermore, as an aside, we note that the FCC, itself, has defined the Internet as an information service, not as a cable service. *See In Re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501 ¶ 66, 1998 WL 166178 ("Internet service providers themselves provide information services. . . ."). Thus, the FCC

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[12] The Commission urges us to adopt the D.C. Circuit's reasoning in *Texas Utilities Electric Co.* v. *FCC*, 997 F.2d 925 (D.C. Cir. 1993), in determining whether pole attachments used by a cable television company to provide Internet service are entitled to a regulated rent under the 1996 Act. We decline to do so. The D.C. Circuit decided *Texas Utilities Electric Co.* before the 1996 amendments were enacted. Prior to 1996, section 224 instructed the FCC to set a reasonable rent for "any attachment by a cable television system." 47 U.S.C. § 224(a)(4), (d)(1) (1994). It did not specify the particular services of a cable television system that were entitled to a regulated rent. Because Congress, in passing the 1978 Act, did not specify whether it "place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching," *Texas Utils. Elec. Co.*, 997 F.2d at 930, the court found the statute ambiguous. The court, therefore, deferred to the FCC's interpretation that co-mingled services were covered by section 224. Today we are faced with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities Electric Co.* because Congress, in 1996, amended the Act to eliminate the ambiguity at issue in that case. The new section 224(d)(3) states that "solely cable services" receive regulated rents. (Telecommunications services, which also receive regulated rents are discussed in the text *infra*.) Because we now know that the statute emphasizes the type of service over the type of entity acquiring the attachment, we have no need to follow the reasoning of *Texas Utilities Electric Co.* Indeed, to follow that reasoning would be to disregard our duty under *Chevron* to give effect to Congress' unambiguous intent. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781.

lacks statutory authority to regulate the Internet under the 1996 Act based on the theory that Internet service is a cable service.

The only remaining basis for the Commission's authority to regulate the Internet under the 1996 Act is to treat the Internet as a telecommunications service. *See* 47 U.S.C. § 224(d)(3), (e) (directing the Commission to develop a rate for telecommunications carriers providing telecommunications service). The FCC, however, did not raise that argument before us. Nor could it have because the FCC has specifically said that the Internet is not a telecommunications service. *See Report and Order*, 13 F.C.C.R. at 6795 ("The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the 1996 Act."); *In Re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87 ¶ 69 (1996) ("Internet service does not meet the statutory definition of a 'telecommunications service.' ").[33] Accordingly, there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act.

In sum, Congress, in the 1996 Act, authorized the FCC to develop rent formulas for attachments providing cable and telecommunications services. Internet

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[33] The FCC has given the following examples of telecommunications services: cellular telephone and paging services; mobile radio services; operator services; PCS (personal communications services); access to interexchange service; special access; wide area telephone service (WATS); toll-free service; 900 service; MTS; private line; telex; telegraph; video services; satellite services; and resale services. *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776 ¶ 780 (1997). Even if this list is not exhaustive, all of these examples are materially different from the Internet.

service does not meet the definition of either a cable service or a telecommunications service. Therefore, the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service.

VI.

The Petitioners' final challenge is to the FCC's statutory authority to regulate the rents utilities charge for dark fiber attachments. Dark fiber, which exists within a fiber optic cable, "consists of . . . bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity." *Report and Order*, 13 F.C.C.R. at 6810. The advantage of stringing cables with lit and dark fiber is that dark fiber provides excess distribution and transmittal capacity for a cable or telecommunications company to use as its service network expands. Dark fiber also may be leased to a third party. Because dark fiber is bare capacity, it technically is neither a telecommunications service nor a cable service. In fact, it is not a service at all; it is simply an inactive fiber.

The 1996 Act authorizes the FCC to regulate the pole attachments of cable television and telecommunications companies that provide cable and telecommunications services. *See* 47 U.S.C. § 224; *supra* part V. The 1996 Act says nothing about regulating bare capacity. But, these bare capacity fibers do not generally exist on their own. They are usually located within cables that also contain fibers providing cable or telecommunications services, i.e., lit fibers the FCC clearly has the authority to regulate. Thus, unlike Internet service or wireless carriers, the statute's silence does not resolve the issue of whether the Commission may regulate dark fiber. Both Internet service and wireless carriers are

similar to items the statute covers. The statute defines the kinds of attachers it covers, and wireless carriers do not fall within that definition. Similarly, the statute defines the types of wire services it covers, and Internet services are not one of those services. We can, therefore, say, based on the 1996 Act alone, that the FCC lacks the authority to regulate wireless carriers and the provision of Internet services. Dark fiber, however, is not a service (nor, of course, is it a type of attacher). Thus, the fact that it falls outside the definitions of "cable service" and "telecommunications service" tells us nothing about Congress' intent to regulate dark fiber. Congress did say that it did not intend to have an attacher pay twice for a single attachment, *see* H.R. Rep. No. 104-204, at 92, *reprinted in* 1996 U.S.C.C.A.N. at 59, but the legislative history does not indicate whether dark fiber and its host were to be considered a single attachment. Congress' intent is ambiguous; therefore, we proceed to step two of the *Chevron* analytical framework and consider whether the FCC reasonably interpreted Congress' silence on dark fiber. *See Chevron*, 467 U.S. at 843, 104 S. Ct. at 2781-82.[34]

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[34] Our conclusion that Congress' intent is ambiguous is consistent with our conclusion that section 224 does not authorize the FCC to regulate wireless carriers or the provision of Internet services because, as we state in the text, wireless carriers and Internet service are similar in kind to the attachers and services the 1996 Act discusses. Dark fiber, however, is a different bird altogether. Neither the statute nor the legislative history discusses anything similar to dark fiber. Therefore, we cannot even begin to discern, let alone declare unambiguous, Congress' intent regarding dark fiber.

The FCC decided that dark fiber is not a separate attaching entity from its host attachment. *See Report and Order*, 13 F.C.C.R. at 6811.[35] According to the FCC, dark fibers place no more burden on a pole than do their host attachments. *See id.* This makes sense since dark fiber, by definition, is merely bare capacity and is included within its host attachment at the time that cable is attached to the pole. Further, we presume that in determining the rent for the host attachment, the utility and the FCC will account for the dark fibers contained within the attaching host. By accounting for the dark fibers in the rent determination for the host cable, the Commission ensures that the utility receives just compensation for any burden the dark fiber may cause the pole at the time the host attaches. Hence, once the utility has been compensated, there is no reason to treat dark fiber as a separate attaching entity, and the FCC's decision not to do so is reasonable.[36]

VII.

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[35] Section 224(e)(2) directs a utility to "apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities," and section 224(e)(3) directs a utility to "apportion the cost of providing usable space among all entities." The FCC determined that dark fiber did not constitute a separate entity from its host attacher for purposes of sections 224(e)(2) and (3).

[36] Our ruling on dark fiber is narrow; holding only that it was reasonable for the FCC to consider pure dark fiber and its host as one attaching entity. We are not presented with a factual scenario involving dark fiber that becomes lit, thus we do not address the status of such a fiber. Nor do we address dark fiber located within a cable whose attachment the FCC lacks authority to regulate under section 224(f).

For the foregoing reasons, we hold that the non-discriminatory access provision of the 1996 Act authorizes a taking of a portion of the Petitioners' poles, which occurs when the FCC issues a rent determination order as to a particular pole or set of poles. Whether the rent formula developed by the FCC, including its decision not to require additional compensation for overlashed wires, provides just compensation is not ripe for review because it is not presented in a sufficiently concrete form for adjudication. Further, we hold that the FCC lacks the authority to regulate wireless carriers and the provision of Internet service under the 1996 Act. Finally, we hold that the FCC's decision not to count leased dark fiber as an additional attaching entity is reasonable.

SO ORDERED.

CARNES, Circuit Judge, concurring in part and dissenting in part:

On review in these cases is *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 1998 WL 46987 (1998) ("*Order* "), the order of the Federal Communications Commission which implements the amendments to the Pole Attachment Act of 1978, 47 U.S.C. § 224, contained in the Telecommunications Act of 1996. Because I believe that the Pole Attachment Act of 1978, as amended, extends regulated rates to all pole attachments, including those used for wireless telecommunications service and Internet service, I dissent from the parts of the Court's decision reaching a contrary conclusion.

I do agree with the majority opinion's conclusions regarding the petitioners' facial attack on the rate formula prescribed in the *Order*. As this Court held in *Gulf Power Co. et al.* v. *United States*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I* "), section 224(f), the statutory provision requiring utilities to accept pole attachments, effects a per se taking of property under the Fifth Amendment for which just compensation is required.[1] *Id.* at 1328-31. But the petitioners have failed to show that the *Order's* rate formula will deny just compensation in every case. Consequently, their facial challenge to the formula is unripe and, as the majority opinion concludes, it should not be considered by this Court.[2] *Id.*

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[1] Section 224(f) reads as follows:

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

[2] Likewise, I agree with the majority opinion's conclusion regarding the petitioners' argument that the rate formula denies just compensation when wires are overlashed because no additional compensation is awarded. It is possible that in some cases the rate formula will provide just compensation for both the original attachment and the overlashed cables without additional compensation. Again, the petitioners have failed to show that the rate formula will deny just compensation in every case. Thus, their challenge is unripe.

I disagree, however, with the majority opinion's holdings regarding wireless telecommunications service and Internet service. It concludes that the FCC has no authority to regulate either wireless telecommunications carriers or Internet service providers, but the plain language of the statute mandates the opposite conclusion.[3]

Section 224(b)(1) provides that the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." The term "pole attachment" is defined in section 224(a)(4) as "*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." (emphasis added). As this Court has stated, more than once, "the adjective 'any' is not ambiguous; it has a well-established meaning." *Merritt* v. *Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997); *accord Lyes* v. *City of Riviera Beach, Florida*, 166 F.3d 1332, 1337 (11th Cir. 1999) (en banc). "Read naturally, the word 'any' has an expansive mean-

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[3] As noted in the majority opinion, we apply the two-step *Chevron* analysis to agency interpretations of a statute. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). "First, the court is to determine if the intent of Congress is clear; if so, that is the end of the matter. On the other hand, if Congress has not spoken directly to the precise question at issue, a second step of review comes into play, and the court must determine whether the agency's answer to the question Congress left open reflects a permissible construction of the statute." *Jaramillo* v. *INS*, 1 F.3d 1149, 1152 (11th Cir. 1993) (en banc). We use the normal tools of statutory construction to judge whether Congress' intent is clear. *See INS* v. *Cardoza Fonseca*, 480 U.S. 421, 446, 107 S. Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2782 n.9).

ing, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) (citations omitted) (as quoted in *Merritt*, 120 F.3d at 1186). Applying that definition to sections 224(a)(4) and (b)(1), the FCC has the authority to regulate *all* attachments, i.e., attachments "of whatever kind," *id.*, by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. Obviously, *all* attachments includes those attachments used to provide wireless and Internet services.

The majority opinion does not attempt to justify its conclusions regarding wireless service with the language of the statute, except to say that there is a "negative implication" created by the statutory definition of a pole attachment coupled with the definition of a utility.[4] But the negative implication, if there is one at all, is not nearly as strong as the majority seems to think. The statutory definition of utility serves merely to exempt from mandatory access any utility that does not make its poles available for wire communications at all. If a utility does not make its poles available for wire communications, it does not have to make its poles available for wireless communications. However, once a utility makes its poles available, even "in part," for wire communications, it is subject to mandatory access for all pole attachments. Nothing about the definition

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[4] Pole attachment is defined in section 224(a)(4) as "any attachment . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Utility is defined in section 224(a)(1) as "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."

of utility negates the FCC's mandate to regulate rates for all pole attachments.

Notwithstanding the straightforward statutory language, the majority opinion turns to legislative history to justify its conclusion about wireless communications. But the Supreme Court, as well as this Court, has repeatedly held when the meaning of a statute is clear from its plain language, it is unnecessary to look to legislative history. *See Gonzales*, 520 U.S. at 6, 117 S. Ct. at 1035 ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 662, 126 L.Ed.2d 615 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"); *United States* v. *Paradies*, 98 F.3d 1266, 1288 (11th Cir. 1996) ("Because the language in the statute is clear, it would be improper to look to the legislative history for clarification."). Because the statutory language at issue is unambiguous, resort to legislative history in order to undermine it is unnecessary and improper.

With respect to Internet service, the majority opinion concludes that the FCC has no authority to regulate it because Internet service is neither a cable service nor a telecommunications service, and is thus not covered by the rate formulas described in section 224(d) for "solely" cable services and in section 224(e) for telecommunications services. But the majority opinion fails to address the section 224(b)(1) mandate that the FCC "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable. . . ." Because pole attachment is defined as "any attachment," and because

of the unambiguous definition of "any," section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service.

Finally, I agree with the majority opinion's conclusion that the FCC has the authority to regulate dark fiber and that the FCC's decision not to treat dark fiber as a separate attaching entity is reasonable. For reasons I have already discussed, dark fiber is within the definition of pole attachment, and it is therefore within the FCC's regulatory authority. The FCC's decision to treat dark fiber and its host attachment as one attaching entity is reasonable, because, as the majority opinion notes, "dark fiber, by definition, is merely bare capacity and is included within its host attachment at the time that cable is attached to the pole."

The problem is how the majority opinion reaches the conclusion that the FCC is authorized to regulate dark fiber. It does so by concluding that because dark fiber is neither a cable service nor a telecommunications service, the statute is ambiguous. But the same majority opinion also concludes that because Internet service is neither a cable service nor a telecommunications service, the statute is unambiguous and Internet service is outside the FCC's regulatory authority. The majority cannot have it both ways—either the statute unambiguously gives the FCC the authority to regulate only cable and telecommunications services, or the statute is ambiguous about whether the FCC has authority to regulate more than cable and telecommunications services. My view is consistent: The statute unambiguously gives the FCC authority to regulate any and all

pole attachments. The majority opinion's view is not consistent.

Because I believe that the statute unambiguously gives the FCC regulatory authority over wireless telecommunications service and Internet service, I dissent from those parts of the majority opinion holding to the contrary.

APPENDIX B

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Nos. 98-6222, 98-2589, 98-4675, 98-6414,
98-6430, 98-6431, 98-6442, 98-6458,
98-6476 to 98-6478, 98-6485 and 98-6486

GULF POWER COMPANY; ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

TAMPA ELECTRIC COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

COMMONWEALTH EDISON COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

TEXAS UTILITIES ELECTRIC COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

UNION ELECTRIC COMPANY, D.B.A. AMERENUE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN ELECTRIC POWER SERVICES CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DUKE ENERGY CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

VIRGINIA ELECTRIC AND POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

CAROLINA POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DUQUESNE LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DUQUESNE LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Sept. 12, 2000

Before: TJOFLAT, EDMONDSON, BLACK, CARNES, BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

All other active judges of the Court were recused.

CARNES, Circuit Judge, concerning the denial of rehearing en banc:

My opinion concurring in part and dissenting in part from the panel decision, *see Gulf Power Co.* v. *FCC*, 208 F.3d 1263, 1279 (11th Cir. 2000), explains why I think the panel majority erred in holding the Pole Attachment Act's regulated rate provisions do not extend to attachments used for wireless communications and Internet services. There is no point in reiterating here what I said there. Instead, I write separately upon the denial of rehearing en banc, because this case is a good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be

changed by Congress or by the Supreme Court through the Rules Enabling Act, *see* 28 U.S.C. § 2072.[1]

Rule 35(a) provides that: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." This Court, along with some of the other federal courts of appeals, has interpreted "circuit judges who are in regular active service" to include all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating. In other words, we interpret the rule to mean that the votes of absolute majority, or seven of the twelve judges in active service on our court now, are necessary to take a case en banc. I do not quarrel with our interpretation of the rule, although we are on the short side of a circuit split regarding it, *see* Judith A. McKenna et al., *Federal Judicial Center, Case Management Procedure in the Federal Courts of Appeals* 23 (2000) (table indicating that eight circuits do not count disqualified judges when calculating a majority for en banc rehearing purposes, while five circuits do).[2] But I do think that Rule 35(a) should be amended so that it is clear that

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[1] The operative language in Rule 35(a) is drawn from 28 U.S.C. § 46(c), which would need to be amended by Congress or superceded by an amendment to the rule, see 28 U.S.C. § 2072(b).

[2] A good recounting of the history of the interpretative issue and a summary of the arguments on both sides of it are contained in James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L. Rev. 1505 (1984). *See also* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 807-17, 825-27, 851-54 (1993).

disqualified judges are not counted, in effect, as a vote against rehearing en banc.

As the order denying rehearing en banc in this case indicates, five of the twelve judges in active service on this Court are disqualified from participating in this important case.[3] That leaves only seven judges. Two of those seven judges split on the legal issue in question—one of them authored the panel majority opinion and the other one dissented from an important holding in it. Yet the dissenting judge and the five remaining, non- disqualified judges in active service are unable to vote the case en banc under Rule 35(a), no matter how wrong they may think the panel majority's holding is, unless the judge who authored the panel majority opinion votes with them to do it. It sometimes happens that a judge who authors a panel opinion votes to take the case en banc, *see Songer* v. *Wainwright*, 756 F.2d 799 (11th Cir. 1985) (Roney, J., specially concurring in the order granting rehearing en banc), but not very often.[4]

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[3] Some may say that all the order indicates is that five judges did not participate and that they obviously recused themselves, but not necessarily that they were disqualified from participating. *See* generally 28 U.S.C. § 46(b) ("unless such judges cannot sit because recused or disqualified"). Whether there is any real distinction between recusal and disqualification is a collateral issue not material to the present discussion. What is material is that five judges of this Court in active service felt compelled not to participate in the en banc poll. I will follow what appears to be the practice of most commentators and decisions by using disqualification as a synonym for recusal.

[4] Sometimes a judge will author or join a panel decision dictated by a prior panel precedent that the judge feels should be changed by the en banc court. In that circumstance, which does not occur with much frequency, it is not unusual for a judge who

Assume with me, for present purposes, that this is not one of those rare cases in which the judge who authored the majority opinion for the panel wants to have it reviewed by the court sitting en banc—assume that judge has voted against en banc rehearing. If this is one of the usual cases where the author of the panel opinion votes against rehearing en banc, then this case could not be taken en banc no matter how strongly the remaining six non-disqualified judges thought it should be. En banc rehearing is not possible in such a situation because six is not seven, and Rule 35(a) insists on seven votes, and it is not satisfied by any fewer number, not even by six out of seven. The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven non-disqualified judges of this Court in active service, but instead by the vote of the senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel.[5] That is how Rule 35(a)'s absolute majority requirement operates.

As bad as the operation of Rule 35(a) is in this case, it can be worse. If one more judge in active service on this Court had been disqualified, it would have been impossible for the remaining six non-disqualified judges to vote the case en banc, even if the judge who

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wrote or joined the panel decision to vote to take the case en banc, in effect using it as a vehicle for overruling the prior panel precedent.

[5] In the usual case there will be a visiting judge or a senior judge of this Court sitting on a panel with two active judges. That was the way more than 70 percent of our panels were composed this court year.

authored the majority opinion was willing to take the extraordinary step of voting for en banc rehearing.

The rule as written can even operate to impose on the circuit and its judges law with which every non-disqualified judge in active service disagrees. It is not unusual for our court to sit in panels consisting of one active judge plus two senior judges, or an active judge plus one senior judge and one visiting judge.[6] With such panels, if six or more judges in active service are disqualified from participating in a case, Rule 35(a) makes it possible for the law of the circuit to be set by one senior judge and one visiting judge, even though every one of the non-disqualified judges in active service (up to six in number) adamantly disagree with them about what that law should be.

It can be worse still. If the chief judge of the circuit declares an emergency, which is defined to include the illness of a judge, the requirement that a majority of each panel of a court of appeals be members (active or senior) of that court of appeals is lifted. *See* 28 U.S.C. § 46(b).[7] Although not frequently invoked, this emergency provision has recently resulted in a panel of our Court being composed of one judge in active service

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[6] By "visiting judge" I mean one who was not appointed to sit on this Court. A visiting judge can be a district judge from this or another circuit, or a senior circuit judge from another circuit.

[7] "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness." 28 U.S.C. § 46(b).

and two visiting judges. *See Parris* v. *The Miami Herald Publ'g Co.*, 216 F.3d 1298, 1299 (11th Cir. 2000) (panel consisting of one judge of this Court, a senior judge of another circuit, and a senior district court judge). In that circumstance, if six or more judges in active service on this Court were disqualified, Rule 35(a) could operate to have the law of the circuit made by two visiting judges, and there would be nothing that the six active judges of this Court who were not disqualified could do about it.

What possible justification can there be for the absolute majority rule—why make it possible to have the law of the circuit determined by one active judge against the views of six others, or by a senior and a visiting judge or two visiting judges against the views of six judges in active service? Why not let the decision whether to rehear a case en banc be made by a majority of the judges in active service who are not disqualified? More than a quarter of a century ago, Judge Mansfield, joined by two other Second Circuit judges, put forward two justifications for the absolute majority requirement of Rule 35(a), and 28 U.S.C. § 46(a) from which Rule 35(a) is drawn. *See Zahn* v. *Int'l Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in the denial of rehearing en banc).

First, Judge Mansfield suggested, the absolute majority rule seeks "to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel." *Id.* If protecting majority rule is the goal of Rule 35(a), then it is counterproductive. Under our prior panel precedent rule, a

panel decision is the law of the circuit unless and until it is overruled by the Supreme Court or the en banc court. *See United States* v. *Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) ("The law of this circuit is emphatic that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision.") (internal marks and citation omitted). Every other circuit, or virtually every one, follows the same principle: The law of the circuit is established not just by en banc decisions, but by panel decisions as well. *See United States* v. *Washington*, 127 F.3d 510, 517 (6th Cir. 1997) ("In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision."); Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 Marq. L. Rev. 755, 755-56 (1993) ("[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit."). The absolute majority requirement does nothing to prevent panel decisions from establishing the law of the circuit; instead, the requirement makes it more difficult, or impossible, to have the law made in some panel decisions reviewed en banc.

By insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of the judges in active service. After all, which is a better bet to reflect the views of seven of twelve active judges—the views of six of those judges, or the views of one? And where a question of exceptional importance is involved, shouldn't the law of the circuit be decided by six out of twelve active judges instead of by one

active judge coupled with a visiting judge? With en banc worthy issues is it not better to have the law of the circuit decided by six of twelve judges in active service than by one of them, or by none of them—which is what can happen under Rule 35(a) when a panel includes two senior judges or a senior and a visiting judge.

Judge Mansfield also suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court." *Zahn*, 469 F.2d at 1041. Two things about that. First, the question is not whether to limit en banc review to questions of exceptional importance, but who is better to decide whether a case meets that standard and warrants en banc review—a majority of the judges in active service who are not disqualified, or a minority of those non-disqualified judges, perhaps only one of them? Second, whatever may have been the case a quarter of a century ago, viewed from the perspective of federal appellate courts struggling under the heavy and increasing caseloads of the present day, the notion that courts might "drift" into the "unfortunate habit" of having too many en banc rehearings is quaint. En banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having too many of them regardless of whether Rule 35(a) is amended.

Judge Adams of the Third Circuit also had a go at justifying the absolute majority requirement. The case was *Lewis* v. *Univ. of Pittsburgh*, 725 F.2d 910 (3d Cir.

1983), and the vote was five for rehearing en banc, three against, and two disqualified, *id.* at 928-29 (opinion of Adams, J., on the petition for rehearing). Fearing that the result—denial of rehearing en banc when the vote was five to three in favor of it—"must appear quite unfair" to the losing litigant, Judge Adams attempted to explain the reason for the absolute majority requirement. *Id.* at 929. The "main reason" for the requirement, he said, "is that it insures that major developments in the law of the Circuit reflect the participation of all members of the Court." *Id.* But, of course, because of the prior panel precedent rule the absolute majority requirement does not do that at all. The decision of the panel majority, even if it was composed of only one active judge (or none), is the law of the circuit unless and until overruled en banc or by the Supreme Court. Coupled with the prior panel precedent rule, the absolute majority requirement actually operates to make it more likely that the law of the circuit will not represent the views of a majority of the judges in active service. It does that by preventing the non-disqualified active judges from voting a case en banc in some circumstances even where they (because of their greater number) are more likely to reflect the views of the majority of judges in active service than those, if any, voting against en banc rehearing.

Judge Adams also suggested that lowering the absolute majority bar would lead to the law becoming more unsettled. *See id.* He gave as a hypothetical for his court, which had ten active members, the situation in which there were five recusals and a vote of three to two in favor of en banc rehearing. *See id.* Two things about that. First, Judge Adams did not explain why letting the law be decided by three active judges in-

stead of by two would unsettle it. Perhaps the assumption is that en banc rehearings are unsettling, and therefore the fewer of them the better. But leaving a panel opinion in place, particularly if en banc review is sought because the panel opinion conflicts with one or more prior panel decisions, or with a Supreme Court decision, can also unsettle the law. Second, the argument that the absolute majority requirement promotes stability in the law by reducing the number of en banc rehearings knows no end. If cutting down on the number of en banc rehearings is the goal, why limit the effort to recusal situations? Why not raise the bar in all cases by requiring the vote of some super majority, such as three-fifths or three-fourths, of all active judges?

Rule 35(a) should be clarified through amendment, because the circuits are split eight to five on the issue, *see McKenna*, *supra*, and there is no good reason why a uniform rule should not be followed in all the circuits. For example, both the Tenth Circuit and this circuit have twelve authorized judgeships. If five active judges are disqualified and six of the remaining seven are convinced the panel decision should be corrected en banc, in the Tenth Circuit it will be. In this circuit, it will not be. A litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit. The definition of "majority of the circuit judges who are in regular active service" should not vary with geography.

It is particularly unfortunate that the geographic lottery relating to Rule 35(a) has worked against en banc rehearing in this case, because this is an important

case that may affect every person who uses wireless communication or Internet service in this country. The case comes to us on consolidated petitions for review filed by power companies from around the country and involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers. A more national case could hardly be imagined. And, as the Department of Justice points out, "because this case arose on Hobbs Act review of FCC rules, it may present the last opportunity for any court to address the core, industry-shaping issues presented here." FCC's Petition for Panel Rehearing and Suggestion for Rehearing En Banc at 2. Yet the law on those industry-shaping issues of exceptional importance is decided not by a majority of the judges in active service on this Court but instead solely by one active judge of this Court joined by a senior judge from another court.

In his defense of the absolute majority requirement, Judge Mansfield said that it is not unfair, because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue." *Zahn*, 469 F.2d at 1041. We will see.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486
FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATION COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of an Order of the Federal Communications Commission

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[Filed: Sept. 12, 2000]

BEFORE: TJOFLAT and CARNES, Circuit Judges, and GARWOOD*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Respondents, Federal Communications Commission is DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

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* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CS Docket No. 97-151

IN THE MATTER OF
IMPLEMENTATION OF SECTION 703(e)
OF THE TELECOMMUNICATIONS ACT OF 1996

AMENDMENT OF THE COMMISSION'S RULES
AND POLICIES GOVERNING POLE ATTACHMENTS

Adopted: February 6, 1998
Released: February 6, 1998

REPORT AND ORDER

By the Commission:

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Appendix A: Revised Rules
Appendix B: List of Commenters

I. INTRODUCTION

1. In this *Report and Order* ("*Order*"), the Commission adopts rules implementing Section 703 of the Telecommunications Act of 1996 ("1996 Act")[1] relating to pole attachments.[2] Section 703 requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.[3] Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[4] We adopt the rules set forth in Appendix A hereto based upon the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in this docket (the "*Notice*").[5] A list of commenters, as well as the

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[1] Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 224.

[2] Section 703 amended Section 224 of the Communications Act. Currently Section 224 defines "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Section 224 defines "utility" as any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications, not including any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state. 47 U.S.C. § 224(a)(1).

[3] 47 U.S.C. § 224(e)(1).

[4] *Id.*

[5] *Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725 (1997). In addition, to the extent relevant, we have considered the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in CS Docket No. 97-98 relating to the existing formula for pole attachments. *Notice of Proposed Rulemaking*, CS Docket No. 97-98 (Amendment of

abbreviations used in this *Order* to refer to such parties, is contained in Appendix B hereto. The commenters generally represent the interests of one of the following three categories: (1) utility pole owners;[6] (2) cable operators;[7] and (3) telecommunications carriers.[8]

II. BACKGROUND

2. The purpose of Section 224 of the Communications Act[9] is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach

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Rules and Policies Governing Pole Attachments), 12 FCC Rcd 7449 (1997) ("*Pole Attachment Fee Notice*"). The *Pole Attachment Fee Notice* specifically seeks comment on the Commission's use of the current presumptions, on carrying charge and rate of return elements of the formula, on the use of gross versus net data and on a conduit methodology.

[6] Commenting utility pole owners generally include American Electric, et al., Carolina Power, et al., Colorado Springs Utilities, New York State Investor Owned Electric Utilities, Dayton Power, Duquesne Light, Edison Electric/UTC, Ohio Edison, Texas Utilities and Union Electric.

[7] Commenting cable operator interests generally include Adelphia, et al., New York Cable Television Assn., Comcast, et al., NCTA, SCBA and Summit.

[8] Commenting telecommunications carrier interests generally include Ameritech, AT&T, Bell Atlantic, BellSouth, Champlain Valley Telecom, et al., GTE, ICG Communications, KMC Telecom, MCI, Omnipoint, RCN, SBC, Sprint, Teligent, USTA, U S West and Winstar.

[9] Pub. L. No. 95-234 ("1978 Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 U.S.C. § 224.

customers.[10] The rules we adopt in this *Order* further the pro-competitive goals of Section 224 and the 1996 Act by giving incumbents and new entrants in the telecommunications market fair and nondiscriminatory access to poles and other facilities, while safeguarding the interests of the owners of those facilities.

3. As originally enacted, Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television. Congress sought to prohibit utilities from engaging in "unfair pole attachment practices . . . and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[11] As mandated by Section 224, the Commission established a formula to calculate maximum rates that utilities could charge cable operators for the installation of attachments on utility facilities where such rates are not regulated by a state.[12] In subsequent proceedings

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[10] S. Rep. No. 580, 95th Cong., 1st Sess. 19, 20 (1977) ("*1977 Senate Report*"), *reprinted in* 1978 U.S.C.C.A.N. 109, 121.

[11] *Id.*

[12] *First Report and Order* (Adoption of Rules for the Regulation of Cable Television Pole Attachments), CC Docket No. 78-144, 68 FCC 2d 1585 (1978) ("*First Report and Order*"); *see also Second Report and Order*, 72 FCC 2d 59 (1979) ("*Second Report and Order*"); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd Monongahela Power Co.* v. *FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); *Report and Order*, CC Docket No. 86-212 (Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles), 2 FCC Rcd 4387, 4387-4407 (1987) ("*Pole Attachment Order*"), *recon. denied*, 4 FCC Rcd 468 (1989).

the Commission amended and clarified its methodology for establishing rates and its complaint process.[13]

4. The 1996 Act amended Section 224 in several important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.[14] Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme of rate regulation governing such attachments.[15] In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of Section 224.[16]

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[13] *Second Report and Order*, 72 FCC 2d 59; *Memorandum Opinion and Order* (Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556), FCC 84-325 (released July 25, 1984) ("*Usable Space Order*"); *see also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachment formula relating to net pole investment and carrying charges). Following Alabama Power, the Commission revised its rules in the *Pole Attachment Order*, 2 FCC Rcd 4387.

[14] 47 U.S.C. § 224.

[15] 47 U.S.C. § 224(a), (f).

[16] *First Report and Order*, CC Docket No. 96-98 (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), 11 FCC Rcd 15499, 16058-107, paras. 1119-1240 (1996) (the "*Local Competition Order*"), *rev'd on other grounds, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board*, 66 U.S.L.W. 3387, 66 U.S.L.W. 3484, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411). In August 1996, the Commission also issued a *Report and Order* in CS Docket No. 96-166 (Implementation of Section 703 of the Telecommunications Act of 1996), 11 FCC Rcd 9541 (1996),

5. As amended by the 1996 Act, Section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications."[17] The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers.[18] Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[19]

6. Section 224 contains two separate provisions governing maximum rates for pole attachments, one of which covers attachments used to provide cable service and one of which covers attachments for telecommunications services (including attachments used jointly for cable and telecommunications). Section 224(b)(1), which was not amended by the 1996 Act, grants the Commission authority to regulate the rates, terms, and conditions governing pole attachments for cable service to

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amending its rules to reflect the self-effectuating additions and revisions to Section 224.

[17] 47 U.S.C. § 224(a).

[18] 47 U.S.C. § 224(a)(5).

[19] *Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, 104th Cong., 2d Sess. 98-100, 113 ("*Conf. Rpt.*").

ensure that they are just and reasonable.[20] Section 224(d)(1) defines a just and reasonable rate as ranging from the statutory minimum (incremental costs) to the statutory maximum (fully allocated costs).[21] Incremental costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments.[22] Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable pole space that is occupied by an attacher.[23]

7. Separately, Section 224(e)(1), the subject of this *Order*, governs rates for pole attachments used in the

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[20] *Cf.* 47 U.S.C. § 224(c)(1). The Commission does not have authority where a state regulates pole attachment rates, terms, and conditions. Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission also occurs, with respect to individual cases, if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing.

47 U.S.C. § 224(c)(3).

[21] 47 U.S.C. § 224(d)(1).

[22] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See 1977 Senate Report* at 19. A pole "change-out" is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405 n.3. Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover the make-ready or change-out charges directly from cable systems. See *1977 Senate Report* at 19.

[23] *Id.* at 19-20.

provision of telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. Under this section, the Commission must prescribe, no later than two years after the date of enactment of the 1996 Act, regulations "to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges."[24] Section 224(e)(1) states that such regulations "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for such pole attachments."[25] The section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and to telecommunications carriers.[26]

8. In the *Notice*, the Commission sought comment on implementing a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and

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[24] 47 U.S.C. § 224(e)(1). The 1996 Act was enacted on February 8, 1996.

[25] *Id.*

[26] 47 U.S.C. § 224(d)(3); 47 C.F.R. § 1.1401. Pursuant to Section 224(d)(3), the current formula will continue to be applicable to cable systems providing only cable service and, until February 8, 2001, to cable systems and telecommunications carriers providing telecommunications services. See Section VI below regarding the implementation and the effective date of the rules we adopt herein.

conduit[27] rates for telecommunications carriers.[28] Under the present formula, a portion of the total annual cost of a pole is included in the pole attachment rate based on the portion of the usable space occupied by the attaching entity.[29] Under the 1996 Act's amendments, the portion of the total annual cost included in the pole attachment rate for cable systems and telecommunications carriers providing telecommunications services will be determined under a more delineated method. This method allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner. The Commission also sought comment on how to ensure that rates charged for use of rights-of-way are just, reasonable, and nondiscriminatory.[30]

9. The rules we adopt today implement the plain language of Section 224. That section provides that the regulations promulgated will apply "when the parties fail to resolve a dispute over such charges."[31] Accordingly, and as discussed below, we encourage parties to negotiate the rates, terms, and conditions of pole attachment agreements. Although the Commission's rules will serve as a backdrop to such negotiations, we intend the Commission's enforcement mechanisms to be utilized only when good faith negotiations fail. Based on

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27 A conduit is a pipe placed in the ground through which cables are pulled. FCC ARMIS Operating Data Report, FCC Report 43-08 (January 1992).

28 *Notice*, 12 FCC Rcd at 11739-40, paras. 36-41.

29 *See Third Report and Order*, 77 FCC 2d 187 (1980).

30 *Notice*, 12 FCC Rcd at 11740, paras. 42-43.

31 47 U.S.C. § 224(e)(1).

the Commission's history of successful implementation and enforcement of rules governing attachments used to provide cable service, we believe that the new rules we adopt today will foster competition in the provision of communications services while guaranteeing fair compensation for the utilities that own the infrastructure upon which such competition depends.

III. PREFERENCE FOR NEGOTIATED AGREEMENTS AND COMPLAINT RESOLUTION PROCEDURES

A. Background

10. The 1996 Act amended Section 224 by adding a new subsection (e)(1) to:

> . . . govern the charges for pole attachments used by telecommunications providers to provide telecommunications services when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.[32]

The statute,[33] legislative policy,[34] administrative authority,[35] and current industry practices[36] all make

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[32] 47 U.S.C. § 224(e)(1).

[33] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

[34] *1977 Senate Report* at 19-20; *Conf. Rpt.* at 205-207.

[35] *First Report and Order*, 68 FCC 2d 1585 (setting initial rules for the complaint process, formula elements and the use of historical costs); *Second Report and Order*, 72 FCC 2d 59 (setting spatial presumptions and defined incremental and fully allocated costs for use in formula); *Third Report and Order*, 72 FCC 2d 187, *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254; *Pole Attachment Order*, 2 FCC Rcd 4387, *recon. denied*, 4 FCC Rcd 468.

private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.[37] Pursuant to the Commission's authority to provide for just, reasonable, and nondiscriminatory rates, terms and conditions for pole attachments,[38] attaching entities have recourse to the Commission when unable to resolve a dispute with a utility pole owner. The Commission's rules establish a specific complaint process.[39] Under the current rule, in reviewing a complaint about rates, the Commission will compare the utility's proposed rate to a maximum rate calculated using the statutory formula.[40]

11. In proposing a methodology to implement Section 224(e), the Commission stated in the *Notice* that the Commission's role is limited to circumstances when the parties fail to resolve a dispute and that negotiations between a utility and an attacher should continue to be the primary means by which pole

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[36] *See, e.g.*, Carolina Power, et al., Comments at 11; NCTA Comments at 4-7; USTA Reply at 2.

[37] From 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently, there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.

[38] 47 U.S.C. §§ 224(b)(1), (e)(1), (f)(1).

[39] 47 C.F.R. §§ 1.1401-1.1416.

[40] 47 U.S.C. § 224(d)(1).

attachment issues are resolved.[41] The Commission also indicated that Congress recognized the importance of access in enhancing competition in telecommunications markets and that parties in a pole attachment negotiation do not have equal bargaining positions.[42] To further Congressional intent to foster competition in telecommunications, the Commission proposed to apply to telecommunications carriers the Commission's existing complaint rules developed to resolve pole attachment rate disputes between cable operators and utilities.[43]

12. Some telecommunications carriers and utility pole owners agree that negotiations between a utility and an attaching entity will continue, under Section 224(e), to be the primary means by which pole attachment issues are resolved.[44] Several utility pole owners, however, suggest a number of changes to the complaint process, such as adding a mandatory negotiation period and establishing a statute of limitations and a minimum

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[41] *Notice*, 12 FCC Rcd at 11731, para. 12.

[42] *Id.*

[43] *Id.* The current complaint rule provides that "[t]he complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless." 47 C.F.R. § 1.1404(i).

[44] *See* Bell Atlantic Reply at 2 (negotiation is essential means to establish just and reasonable rates for pole attachments); Carolina Power, et al., Reply at 11 (private negotiations are the cornerstone of attachment agreements); GTE Comments at 4-5; USTA Reply at 2. *But see* MCI Comments at 2 (formula for maximum rate is a necessary condition to making negotiations, and therefore industry resolution of disputes, possible at all).

amount in controversy.[45] American Electric, et al., also contend that meaningful negotiations can occur "only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation."[46] Attaching entities respond that the American Electric, et al., proposals would eliminate recourse to the Commission, contrary to the content and spirit of the law.[47]

13. The Association of Local Telecommunications Services ("ALTS")[48] asserted in its comments in response to the *Pole Attachment Fee Notice* that its members have experience attempting to obtain pole attachments from numerous utilities,[49] and many negotiations were unsatisfactory in part due to the intransigence by or blatant refusal of utilities to negotiate.[50] USTA, a national trade association representing over

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[45] *See* American Electric, et al., Reply at 30; Carolina Power, et al., Comments at 18-19; Duquesne Light Comments at 18-20; Edison Electric/UTC Comments at 7; GTE Reply at 4-5; USTA Comments at 2.

[46] American Electric, et al., Comments at 12-13. American Electric, et al., believe that ary default pricing formula established pursuant to Section 224(e) should be based on Forward-Looking Economic Pricing Model based on economic capital costs. American Electric, et al., Comments at 13,39 and CS Docket No. 97-98 Comments at 4, 42-46, 91-94.

[47] *See, e.g.*, NCTA Reply at 4; *see also* Association for Local Telecommunications Services CS Docket No. 97-98 Comments at 2; USTA CS Docket No. 97-98 Reply at 6.

[48] ALTS is a national trade association representing over 30 telecommunications carriers that are facilities based competitive local exchange carriers ("CLECs"). ALTS CS Docket No. 97-98 Comments at 1.

[49] ALTS CS Docket No. 97-98 Comments at 2.

[50] *Id.*

1,000 LECs,[51] contends that while the most efficient manner to determine just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements,[52] the proposal by American Electric, et al., contravenes the statute.[53]

14. Electric utility pole owners oppose the continued use of the current negotiation process and complaint procedures established for cable operators, claiming the current regulatory scheme has resulted in government-sponsored unilateral contract modification and subsidization of the cable industry by the electric utility ratepayer.[54] American Electric, et al., contend that the Commission must recognize that the bargaining relationship between electric utilities and cable companies has changed since 1978 when Congress provided the cable television industry with access to the distribution poles of utilities at just and reasonable rates.[55] In asserting that attaching entities no longer represent an industry that needs rate regulation under Section 224,[56] American Electric, et al., acknowledge that in 1978

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[51] USTA Comments at 1.

[52] USTA CS Docket No. 97-98 Comments at 2.

[53] USTA CS Docket No. 97-98 Reply at 5-6.

[54] *See, e.g.*, American Electric, et al., Comments at 18-20.

[55] American Electric, et al., CS Docket No. 97-98 Comments at 8 (stating that since 1977, the cable industry has grown to a 67% coverage of homes in America, citing *Third Annual Report*, CS Docket No. 96-133 (In the Matter of Annual Assessment of Status of Competition in the Market for Delivery of Video Programming), 12 FCC Rcd 4358, 4368, para. 14 (1997)); *see also* American Electric, et al., Reply at 5.

[56] American Electric, et al., CS Docket No. 97-98 Comments at 23.

"Congress was concerned with the cable companies' inferior bargaining position vis-a-vis utilities and wanted to assist an industry in its infancy."[57] USTA interprets Congressional intent as expecting the Commission to intervene and rely on the statutory formula only in instances where negotiating parties are unable to reach a mutually acceptable agreement.[58] USTA further states that the Commission has established and maintained a case-by-case dispute resolution process since 1978, rather than adopting a uniform pole attachment rate prescription process in compliance with that Congressional mandate.[59] Cable and telecommunications carriers assert that potential and existing attaching entities do still need pole attachment rate regulation because they are still not able to bargain from a level position with utility pole owners.[60] Cable operators and telecommunications carriers urge the Commission to extend the existing negotiation and complaint resolution system to telecommunications carriers.[61]

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[57] *Id.*

[58] USTA CS Docket No. 97-98 Comments at 2 (quoting the *1977 Senate Report* at 3 ("The basic design of S. 1547, as reported, is to empower the [Commission] to exercise regulatory oversight over the arrangements between utilities and [cable television] systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement")).

[59] USTA CS Docket No. 97-98 Comments at 2.

[60] *See* Comcast, et al., Reply at 16; NCTA Reply at 3-6; New York Cable Television Assn. at 2-3; Teligent Reply at 5-6.

[61] *See, e.g.*, AT&T Comments at 2, Reply at 4; Champlain Valley Telecom, et al., Reply at 6 (objecting to attitude of American Electric, et al., reminding the Commission that its authority is not plenary); Comcast, et al., Reply at 16; NCTA Reply at 3-6. *Cf.* New York Cable Television Assn. at 2-3 (current rule gives utility

15. Some attaching entities suggest that the Commission impose on itself a 90-day time frame in which to issue a decision on a pole attachment complaint.[62] Other cable and telecommunications carriers request that the Commission impose upon utility pole owners the requirement that pole attachment agreements between private parties be on public record so that an attaching entity will have notice of: (1) the expectations of the utility; and (2) the terms provided to other attaching entities.[63] The result would be that the most favored provisions from various agreements would then be available to all attaching entities.[64] Pole owners assert that attaching entities have no legitimate expectation that all provisions be available to all attaching entities.[65]

B. Discussion

16. Our rules for complaint resolution will only apply when the parties are unable to arrive at a negotiated agreement.[66] We affirm our belief that the existing

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pole owner too much leverage); Teligent Reply at 5-6 (sole reliance on negotiations is not enough).

[62] *See* Ameritech Reply at 3-4 (complaint process should provide for expeditious resolution of disputes); KMC Telecom Comments at 5-6 (90 days for the Commission to resolve complaints as a means to workable solutions).

[63] *See* ICG Communications Comments at 16, Reply at 1-2; KMC Telecom Comments at 5-6.

[64] *See* ICG Communications Comments at 16.

[65] *See* American Electric, et al., Reply at 34; Duquesne Light Comments at 19; Edison Electric/UTC Comments at 6-7; Ohio Edison Comments at 18; Union Electric Comments at 17.

[66] *See* American Electric, et al., Comments at 15; AT&T Comments at 2; Bell Atlantic Reply at 2; Carolina Power, et al., Reply at 11; GTE Reply at 5; MCI Comments at 2; NCTA Comments at

methodology for determining a presumptive maximum pole attachment rate, as modified in this *Order*, facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.[67] We further conclude that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments.[68] No party has demonstrated that the Commission's time for resolution has been a problem in the past. While we will not impose a deadline for Commission action, we will continue to endeavor to resolve complaints expeditiously. An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions.[69] We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.

17. We agree with attaching entities that time is critical in establishing the rate, terms, and conditions

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3-4; New York State Investor Owned Electric Utilities Comments at 6; USTA Reply at 2.

[67] *See, e.g.*, AT&T Reply at 4; ICG Communications Comments at 11; MCI Comments at 2; NCTA Comments at 3-4; *see also* Ameritech Reply at 3-5 (favors transparent maximum rate determinations); GTE Reply at 4-5 (uniform and transparent rate formula facilitates private negotiations); KMC Telecom Reply at 1-2 (clear formula and complaint process supports negotiation).

[68] *See* AT&T Comments at 2; MCI Comments at 2; NCTA Comments at 3-4.

[69] *See* GTE Reply at 4-5.

for attaching.[70] Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.[71] For these reasons, we reject a proposal by utilities that we mandate a 180-day negotiation period prior to filing a complaint with the Commission. We agree with cable and telecommunications carriers that such a requirement would not be conducive to a pro-competitive, deregulatory environment.[72] Such an extended period of time could delay a telecommunications carrier's ability to provide service and unnecessarily obstruct the process.[73]

18. We disagree with utilities suggesting that, in addition to the existing time frames, the pole owner should receive 30 days' notice by a cable operator or telecommunications carrier of any intention to file a complaint.[74] Such a notice requirement would be redundant under our rule and would unnecessarily prolong the resolution of disputes. The current rule provides

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[70] *See* AT&T Reply at 4; Ameritech Reply at 3; ICG Communications Comments at 11; MCI Reply at 3.

[71] *See* AT&T Reply at 4 (time is of the essence in negotiation); Ameritech Reply at 3-4 (the Commission should provide for expeditious resolution so that market entry is not delayed); ICG Communications Comments at 11 (timing is important); MCI Reply at 3 (time to market is critical).

[72] *See* ICG Communications Reply at 2-3; KMC Telecom Reply at 4; MCI Reply at 2-3.

[73] *But see* Duquesne Light Comments at 18; Edison Electric/UTC Comments at 7; Carolina Power, et al., Comments at 18-19.

[74] *See* American Electric, et al., Reply at 30; Edison Electric/UTC Reply at 6; GTE Comments at 4-5; USTA Comments at 2, Reply at 4.

for a 45-day period in which the utility pole owner must respond to the request for access filed by a cable operator or telecommunications carrier seeking to install an attachment.[75] A complaint to the Commission must be filed within 30 days of the denial of a request for access.[76] The utility then has an additional 30 days to respond to the complaint.[77] When a cable operator or a telecommunications carrier believes it has cause to complain that a pole attachment rate, term, or condition is not just or reasonable,[78] a detailed set of data and information is required under the current rule.[79] A utility has 30 days in which to respond to an attaching entity's request for the data and information regarding the rate, term, or condition required for the complaint.[80] Under the present rules, the utility has had communication with the attaching entity prior to the filing of the complaint, to such a degree as is necessary to understand the issues in conflict outlined in the complaint. The utility has sufficient notice of the issues involved, making additional notice requirements unnecessary.

19. GTE suggests that we impose a one year statute of limitations on the filing of a complaint and suggests an amount in controversy threshold of $5,000.[81] We view these proposals as unnecessarily restrictive as they could foreclose remedy of an unjust or unreasonable rate, term, or condition of pole attachments,

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75 47 C.F.R. § 1.1403(b).

76 47 C.F.R. § 1.1404(k).

77 47 C.F.R. § 1.1407(a).

78 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

79 47 C.F.R. §§ 1.1404(g)(1-12), (h), (i).

80 47 C.F.R. § 1.1404(h).

81 *See* GTE Comments at 4-5.

especially for small enterprises.[82] There is no provision in the statute for such restrictions. Establishing a threshold of any dollar amount could preclude relief to small entities and would be inconsistent with Section 257 and the pro-competitive goals of the 1996 Act.[83]

20. Utility pole owners must provide access to attaching entities on a non-discriminatory basis.[84] While we do not agree that all pole attachment agreements have to be identical, differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory. We believe that these statutory standards are enforceable under the current rule.

21. We believe it is implicit in our current ruie[85] that all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.[86] In the *Local Competition Order*, the

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[82] *See generally*, SCBA Reply.

[83] 47 U.S.C. § 257. This section requires the Commission to eliminate market entry barriers for entrepreneurs and other small businesses in the provision or ownership of telecommunication services or in the provision of parts or services to telecommunications providers.

[84] 47 U.S.C. § 224(f)(1).

[85] 47 C.F.R. § 1.1404.

[86] In furtherance of our original mandate to institute an expeditious procedure for determining pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation, we adopted a program for non-discriminatory access to poles, ducts, conduits and rights-of-way in the *Local Competition Order*. 11 FCC Rcd at 16059, para. 1122 (citing the *1977 Senate Report* at 19). In the *Notice*, the Commission affirmed its interpretation of Congressional intent that negotiations between a utility and an attacher should continue to be the primary

Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the incumbent.[87] Rather, these new competitors seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement.[88] In the *Local Competition Order*, the Commission determined that a utility stood in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that was virtually indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the 1996 Act.[89] We find that a utility's demand for a clause waiving the licensee's right to

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means by which pole attachment issues are resolved. *See Notice*, 12 FCC Rcd at 11731, para. 12; see also 47 U.S.C. § 224(f)(1).

[87] 11 FCC Rcd at 15570, para. 141.

[88] *Id.* The Commission continued, determining that a request by an incumbent that a new entrant contractually waive its legal rights or remedies could constitute a violation of the duty to negotiate in good faith imposed by Sections 251(c)(1) and 252, stating: "We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. . . . [W]e find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future." *Id.* at 15576, para. 152.

[89] *See id.* at 15570, para. 141.

federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.[90]

IV. CHARGES FOR ATTACHING

A. Poles

1. Formula Presumptions

22. In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space. The costs relating to these elements are allocated to those using the pole. In the *Second Report and Order*, consistent with Section 224(d)(2), the Commission defined total usable space as the space on the utility pole above the minimum grade level[91] that is usable for the attachment of wires, cables, and related equipment.[92] This determination was based upon survey results, consideration of the National Electric Safety Code ("NESC"), and practical engineering standards used in constructing utility poles. The Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."[93] The Commission recognized the NESC

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[90] *See* Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA No. 97-131 (January 17, 1997).

[91] In this context, minimum grade level generally refers to the ground level or elevation above which distances are measured for determining required clearances.

[92] *See* 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

[93] 72 FCC 2d at 69.

guideline that 18 feet of the pole space must be reserved for ground clearance[94] and that six feet of pole space is for setting the depth of the pole.[95] To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies.[96] These presumptions serve as the premise for calculating pole attachment rates under the current formula.

23. A group of electric utilities filed a white paper ("*White Paper*") in anticipation of the *Notice* and the *Pole Attachment Fee Notice*[97] in which they suggest that an increase in the current presumptive pole height is appropriate. The *White Paper* asserts that over time, and with increased demand, the average pole height has increased to 40 feet. At the same time, the *White Paper* contends that the usable space presumption should be reduced from 13.5 feet to 11 feet.[98] The Commission sought comment on these presumptions in the *Pole Attachment Fee Notice* and sought further comment in the *Notice* to establish a full record for attachments

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94 *Id.* at 68, n.21.

95 *Id.*

96 *Id.* at 69-70.

97 *See White Paper* filed by the law firm of McDermott, Will and Emery on August 28, 1996, on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

98 *Id.* at 11.

made by telecommunications carriers under the 1996 Act.[99]

24. We will address changing the existing presumptions in the *Pole Attachment Fee Notice* rulemaking.[100] Until resolution of that proceeding, we will apply our presumptions as they presently exist and proceed with the implementation under the 1996 Act of a methodology used in the provision of telecommunications services by telecommunications carriers and cable operators.

25. The *Notice* also sought comment on an issue raised by Duquesne Light in its reconsideration petition of the Commission's decision in the *Local Competition Order* proceeding.[101] Duquesne Light advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden on the pole, and therefore of the costs relating to the attachment. Duquesne Light states that varying attachments place different burdens on the pole and proposes that any presumption include factors addressing weight and wind loads.[102] We will address whether any presump-

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[99] *Notice*, 12 FCC Rcd at 11733, para. 17.

[100] *See Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, paras. 18-20. We reserve decision on issues regarding the 37.5 ft. presumptive pole height, the 13.5 ft. presumptive amount of usable space, the minimum ground clearance amount, the allocation of the 40-inch safety space, and the exclusion of 30 ft. poles from the calculation of costs of a bare pole and the determination as to whether such poles lack a sufficient amount of usable space to accommodate multiple attachments.

[101] *Notice*, 12 FCC Rcd at 11733, para. 18 (citing *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240); *see also* Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[102] Duquesne Light CC Docket No. 96-98 Comments at 17-18.

tions should reflect these factors in the *Pole Attachment Fee Notice* rulemaking.

2. Restrictions on Services Provided over Pole Attachments

26. In the *Notice*, we sought comment on whether the Commission's decision in *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* ("*Heritage*")[103] should be extended.[104] In *Heritage*, a cable operator provided traditional cable services as well as nontraditional services through its facilities. Those facilities consisted of coaxial cable lashed to aerial support strands and fiber optic cable overlashed to the aerial support strands.[105] The nontraditional services provided by the cable operator consisted of non-video broadband communications services, including data transmission services.[106] The pole owner attempted to charge the cable operator an additional, unregulated rate for those poles with pole attachments supporting the facilities transmitting both video signals and data.[107]

27. In *Heritage*, which was decided prior to the 1996 Act, the Commission determined that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network within the cable operator's franchise

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[103] 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

[104] *Notice*, 12 FCC Rcd at 11731, para. 13.

[105] *Heritage*, 6 FCC Rcd at 7100.

[106] *Id.*

[107] *Id.*

area justified only a single, regulated pole attachment charge by the utility pole owner.[108] The Commission affirmed its longstanding view of cable as a provider of video and nonvideo broadband services and determined that its pole attachment authority includes nonvideo broadband services under Section 224. The Commission stated that its jurisdiction under Section 224 was not limited by definitions emanating from the Cable Communications Policy Act of 1984 ("Cable Act of 1984")[109] because such definitions apply only for purposes of Title VI.[110] Further, it stated that, even when Section 224 is read in conjunction with the Cable Act of 1984, the Cable Act of 1984 and its legislative history indicate that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224.[111]

28. Whether *Heritage* continues to apply raises significant issues as cable operators expand into new service areas, such as Internet services. Generally, commenters disagree as to the applicability of *Heritage* since the passage of the 1996 Act amendments to Section 224. Some utility pole owners contend that *Heritage* has been overruled by the 1996 Act, but they

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[108] *Id.* at 7107.

[109] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Oct. 30, 1984).

[110] *Heritage*, 6 FCC Rcd at 7103-04.

[111] *Id.* at 7104. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision on appeal because it was "consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system." *Texas Utilities v. FCC*, 977 F.2d at 936.

do not agree as to the effect of the overruling. Some of the utility pole owners argue that the new Sections 224(d)(3) and 224(e) create a new regime requiring new rules,[112] and therefore *Heritage* is no longer applicable. Some of these commenters also argue that, after the year 2001, a cable company is entitled to the old incremental rate under Section 224(d)(3) if the pole attachment is used solely to provide cable services. They contend that the use of a cable attachment to provide nonvideo services in addition to video would not be an attachment used solely for cable service and such attachment would be subject to the Section 224(e) telecommunications services rate.[113] Other utility pole owners argue that the provision of services other than cable and telecommunications services are outside the scope of Section 224 and are therefore not subject to the Commission's jurisdiction.[114] They contend that such services will be subject to market place negotiations.[115]

29. Cable operators generally contend that *Heritage* has not been overruled by the 1996 Act. They also contend that high speed Internet access is a cable service and an operator offering such service should not be assessed the Section 224(e) telecommunications services

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[112] Texas Utilities Reply at 2; GTE Comments at 8; USTA Comments at 4.

[113] Edison Electric/UTC Comments at 9.

[114] American Electric, et al., Comments at 11 (citing *Report and Order*, CC Docket No. 96-45 (In the Matter of Federal-State Joint Board on Universal Service), 12 FCC Rcd 8776 ("*Universal Service Order*"), 9176, para. 781); Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

[115] Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

rate.[116] Telecommunications carriers generally agree that *Heritage* has not been overruled, and therefore the pre-1996 Act rules continue to provide that a utility should not charge different pole attachment rates based on the type of service provided by the cable operator, and further that a utility should be prohibited from placing unreasonable restrictions on the use of pole attachments by permitted attachers.[117] Some of the telecommunications carriers, however, oppose any extension of *Heritage*, arguing that such extension would provide preferential treatment for cable operators.[118] At least one telecommunications carrier argues that the distinctions established by Congress effectively overrule *Heritage* and that cable operators providing additional services besides video service are to be treated as telecommunications carriers under Section 224.[119]

30. We disagree with the utility pole owners who assert that the *Heritage* decision has been "overruled" by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video. The definition of "pole attachment" does not turn on what type of service the attachment is used to provide. Rather, a "pole attachment" is defined to include any attachment by a

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[116] Comcast, et al., Comments at 18; NCTA Comments at 6-7, n.9; New York Cable Television Assn. Comments at 8.

[117] RCN Comments at 5-6; Sprint Comments at 2, Reply at 1-2 (citing MCI Comments at 4-5); U S West Comments at 4-5.

[118] MCI Comments at 6.

[119] *See* Ameritech Comments at 4.

"cable television system."[120] Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act.[121] Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable.[122] We see nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.

31. The history of Section 224 further supports our conclusion. The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments.[123] The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 would penalize cable entities that choose to expand their services in a way that will contribute "to promot[ing] competition in every sector of the communications industry," as Congress intended in the 1996 Act.[124]

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[120] 47 U.S.C. § 224(a)(4).

[121] 47 U.S.C. § 224(b)(1).

[122] *Texas Utilities v. FCC*, 977 F.2d at 934-35.

[123] *1977 Senate Report* at 19, 20.

[124] Preamble to the 1996 Act; *see also* 142 Cong. Rec. S687-01, S687 (daily ed. February 1, 1996) (Statement of Sen. Hollings).

32. Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers.[125] We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.

33. We emphasize that our decision to apply the Section 224(d)(3) rate is based on our regulatory authority under Section 224(b)(1). Several commenters suggested that cable operators providing Internet service should be required to pay the Section 224(e) telecommunications rate.[126] We disagree. The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the 1996 Act.[127] Under this precedent, a cable television system

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[125] We have, through social contracts, encouraged cable operators to provide Internet services to their customers. *See Social Contract for Continental Cablevision*, 10 FCC Rcd 299 (1995), *amended by* 11 FCC Rcd 11118 (1996); *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995), *amended by* FCC Rcd 3099 (1995), *further amended by* 12 FCC Rcd 14881(1996).

[126] *See, e.g.*, Ameritech Comments at 4; Edison Electric/UTC Comments at 9-10; GTE Comments at 6; MCI Comments at 6.

[127] *See* Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776, at 9180-81,

providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service. We note, however, that Congress has

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para.789 (rel. May 8, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Docket Nos. 97-21, 96-45, FCC 97-253 (rel. July 18, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, FCC 97-292, 12 FCC Rcd 12437 (rel. Aug. 15, 1997); Federal-State Joint Board on Universal Service, *Third Report and Order*, CC Docket No. 96-45, (rel. Oct. 14, 1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Second Order on Reconsideration in CC Docket 97-21*, CC Docket Nos. 97-21, 96-45, FCC 97-400 (rel. Nov. 26, 1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Docket No. 96-45, FCC 97-411 (rel. Dec. 16, 1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420 (rel. Dec. 30, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998).

directed the Commission to undertake a review of the implementation of the provisions of the 1996 Act relating to universal service, and to submit a report to Congress no later than April 10, 1998.[128] That report is to provide a detailed description of, among other things, the extent that the Commission's definition of "telecommunications" and "telecommunications service," and its application of those definitions to mixed or hybrid services, are consistent with the language of the 1996 Act.[129] We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

34. We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services. Regardless of whether such commingled services constitute "solely cable services" under Section 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a "cable service" under Section 224(d)(3), then the rate encompassed by that section would clearly apply.[130] Even if

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[128] Pub. L. 105-119, 111 Stat. 2440 (1997), sec. 623.

[129] *Id.*

[130] The legislative history of the 1996 Act may be read to support such a conclusion. See Conf. Rpt. at 206 which indicates that, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by Section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act)." Further, the Conference Report states that "[t]he conferees intend the amendment to

the provision of Internet service over a cable television system is deemed to be neither "cable service" nor "telecommunications service" under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the "rates, terms and conditions [for pole attachments] are just and reasonable," and, as Section 224(a)(4) states, a pole attachment includes "any attachments by a cable television system." And we would, in our discretion, apply the subsection (d) rate as a "just and reasonable rate" for the pro-competitive reasons discussed above. We again emphasize the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services, and that a higher or unregulated rate deters this purpose.[131] We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.

35. We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged

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reflect the evolution of cable to interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services," but was not intended to "cause dial-up access to information services over telephone lines to be classified as a cable service." *Conf. Rpt.* at 169.

[131] *See also Texas Utilities v. FCC*, 977 F.2d at 931-933.

at the higher rate unless the cable operator certifies to the Commission that it is not "offering"[132] telecommunications services.[133] We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status.[134] The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked.

3. Wireless Attachments

a. Background

36. In the *Notice*, the Commission stated that, although wireless carriers have not historically affixed their equipment to utility poles, the 1996 Act gives them the right to do so and entitles them to rates consistent with Commission rules.[135] The *Local*

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[132] Telecommunications services means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(43).

[133] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

[134] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

[135] *Notice*, 12 FCC Rcd at 11741, para. 61.

Competition Order held that Section 224 does not describe the specific type of telecommunications equipment that an entity may attach, and that establishing an exhaustive list of equipment is not advisable or even possible.[136]

37. Some utility pole owners argue for limiting the type of equipment that a party may attach to facilities and assert that wireless carriers should not have the benefit of Section 224. They rely on legislative history accompanying the 1978 Pole Attachment Act[137] and the failure of Section 224 to include the word "wireless" in its language.[138] According to the pole owners, Congress intended to cover pole attachments only for wire communications, and would have explicitly expanded that scope in the 1996 Act if it wanted to do so.[139] These interests cite the *1977 Senate Report* stating, "Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by

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[136] 11 FCC Rcd at 16085, para. 1186.

[137] *1977 Senate Report.*

[138] *See, e.g.*, American Electric, et al., Comments at 11; Edison Electric/UTC Reply at 8; Petition for Reconsideration by Consolidated Edison Company of NY in CC Docket No. 96-98 at 11-12; Petition for Reconsideration by Duquesne Light Co. in CC Docket No. 96-98 at 17-18; Petition for Reconsideration by American Electric Power, et al., in CC Docket No. 96-98 at 1-18, 26-29; Petition for Reconsideration by Florida Power & Light in CC Docket No. 96-98 at 24-26; *see also* Carolina Power, et al., CS Docket 97-98 Reply at 34-37; Edison Electric/UTC CS Docket No. 97-98 Comments at 3-7.

[139] *Id.*

wire or cable."[140] In contrast, wireless providers assert that they are telecommunications carriers entitled to the protection of Section 224.[141] These parties cite Section 3(44), which defines "telecommunications carrier" as "any provider of telecommunications services," and Section 3(46), which defines "telecommunications service" as "the offering of telecommunications for a fee . . . regardless of the facilities used."[142] Wireless providers contend they do not have easy alternatives for placing their equipment because they have had difficulty getting permits to erect antennas.[143] They argue that telecommunications competition arises in many forms and the Commission's regulations should not deter any particular method of delivering services.[144] In short, they ask the Commission to decide that Section 224 "unambiguously affords all telecommunications providers a legal right of access to poles."[145]

38. Telecommunications carriers and the utility pole owners acknowledge that determining an appropriate formula for wireless attachments is difficult.[146] Some utility pole owners assert it is beyond the scope of this

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[140] *1977 Senate Report* at 15; see, e.g., Petition for Reconsideration by American Electric Power, et. al., in CC Docket No. 96-98 at 10-11.

[141] *See, e.g.*, Bell Atlantic Reply at 6-9; Omnipoint Reply at 2-3; Teligent Comments at 2.

[142] 47 U.S.C. § 3(44), (46); see, e.g., Bell Atlantic Reply at 6-9; Omnipoint Reply at 3.

[143] *See, e.g.*, Bell Atlantic Reply at 6-9.

[144] *See, e.g.*, Teligent Comments at 2.

[145] Omnipoint Reply at 3.

[146] *See, e.g.*, Bell Atlantic Reply at 6-9; Edison Electric/UTC Reply at 2.

rulemaking.[147] Some telecommunications carriers and utility pole owners agree that previous and proposed rate formulas do not lend themselves to the requirements of wireless attachments.[148] On the other hand, wireless interests emphasize that pole attachment fees are assessed for the use of space, and should not depend primarily on what type of equipment occupies that space.[149] These parties contend that rates for wire and wireless attachments should be the same so that discriminatory pricing does not occur.[150]

b. Discussion

39. Wireless carriers are entitled to the benefits and protection of Section 224. Section 224(e)(1) plainly states: "The Commission shall . . . prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services."[151] This language encompasses wireless attachments.

40. Statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) previously defined a pole attachment as "any attachment by a cable television system," but

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[147] *See, e.g.*, American Electric, et al., Comments at 5-6; Carolina Power, et al., Reply at 17-18; Edison Electric/UTC Reply at 2-3.

[148] *See, e.g.*, Bell Atlantic Reply Comments at 6-9; Comments at Edison Electric/UTC Comments at 3; GTE Reply at 18.

[149] *See, e.g.*, Teligent Comments at 9-10.

[150] *See, e.g.*, AT&T Reply at 21; Omnipoint Reply at 3; Teligent Comments at 9; Winstar Comments at 2.

[151] 47 U.S.C. § 224(e)(1).

now states that a pole attachment is "any attachment by a cable television system *or provider of telecommunications service.*"[152] Moreover, in Section 224(d)(3), Congress applied the current pole attachment rules as interim rules for "any telecommunications carrier . . . to provide any telecommunications service."[153] In both sections, the use of the word "any" precludes a position that Congress intended to distinguish between wire and wireless attachments. Section 224(e)(1) contains three terms whose definitions support this conclusion. Section 3(44) defines telecommunications carrier as "any provider of telecommunications services."[154] Section 3(46) states that telecommunications services is the "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and Section 3(43) specifies telecommunications to be "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received."[155] The use of "any" in Section 3(44) precludes limiting telecommunications carriers only to wireline providers. Wireless companies meet the definitions in Sections 3(43) and 3(46). In fact, the Commission has already recognized that cellular telephone, mobile radio, and PCS are telecommunications services.[156]

41. There are potential difficulties in applying the Commission's rules to wireless pole attachments, as

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[152] 47 U.S.C. § 224(a)(4) (emphasis added).

[153] 47 U.S.C. § 224(d)(3).

[154] 47 U.S.C. § 153(44).

[155] 47 U.S.C. §§ 153(46), (43).

[156] *See, e.g., Universal Service Order*, 12 FCC Rcd at 9175; *Local Competition Order*, 11 FCC Rcd at 15997.

opponents of attachment rights have argued. They note that previous and proposed rate formulas do not account for the unusual requirements of wireless attachments.[157] These parties assert that such attachments are usually more than a traditional box-like device and cable wires strung between poles. They include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service. One commenter noted that there are "far greater costs and operational considerations" for wireless attachments.[158]

42. There is no clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations fail. When an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted. In addition, when wireless devices do not need to use every pole in a utility's inventory, the parties can agree on some reasonable percentage of poles for developing a presumptive number of attaching entities. If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis.

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[157] *See, e.g.*, Edison Electric/UTC Comments at 4; *see also* Petition for Reconsideration filed by Duquesne Light in CC Docket No. 96-98 at 17-18.

[158] Edison Electric/UTC Comments at 5.

4. Allocating the Cost of Other than Usable Space

a. Method of Allocation

43. To determine the rate that a telecommunications carrier must pay for pole attachments, Section 224(e)(2) provides that:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.[159]

This statutory language requires an equal apportionment of two-thirds of the costs of providing other than usable ("unusable") space among all attaching entities. The Commission proposed a methodology to apportion these costs which translates to the following formula:

$$\text{Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Next Cost of a Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}[160]$$

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[159] 47 U.S.C. § 224(e)(2).

[160] The final component of the overall pole attachment formula is the carrying charge rate. Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes. To help calculate the carrying charge rate, we developed a formula that relate each of these components to the utility's pole investment. *See Pole Attachment Fee Notice* at Appendix A.

44. We adopt our proposed methodology to apportion the cost of unusable space. We believe this formula most accurately determines the apportionment of cost of unusable space. As mandated by Congress, it equally apportions two-thirds of the costs of unusable space among attaching entities.

b. Counting Attaching Entities

(1) Telecommunications Carriers, Cable Operators and Non-Incumbent LECs

45. Under Section 224(e)(2), the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases. Therefore, determining which entities are attachers and which are not has a substantial effect on the proper apportionment of the costs of unusable space. The Commission proposed in the *Notice* that any telecommunications carrier, cable operator, or LEC attaching to a pole be counted as a separate entity for the purposes of the apportionment of two-thirds of the costs of the unusable space.

46. We will count as separate entities any telecommunications carrier, any cable operator, and any non-incumbent LEC.[161] This approach is consistent with the language of the statute and comports with Congress' intent to count all attaching entities when allocating the costs of unusable space.[162] The statute uses the term

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[161] *See* Adelphia, et al., Comments at 6; American Electric, et al., Comments at 40; AT&T Comments at 9; AT&T Reply at 9; Comcast, et al., Reply at 12; KMC Telecom Comments at 6; NCTA Comments at 17-18; New York Cable Television Assn. Comments at 22; Summit Comments at 2-3; U S West Comments at 6-7.

[162] *See Conf. Rpt.* at 206.

"entities" not "telecommunications carriers" when indicating how the costs of unusable space should be allocated. We interpret this use to indicate the inclusion of cable operators as well as telecommunications carriers when allocating the cost of unusable space.

47. Some commenters argue that cable operators providing only cable service should not be counted because it would result in requiring the incumbent LEC that owns a pole, but not the competitors of the incumbent LEC, to subsidize "pure" cable attachments.[163] Similarly, other commenters argue that cable operators that solely provide cable service should not be included in the count because their attachments are not subject to rate regulation under Section 224(e)(2). We find these arguments unpersuasive. The statutory language compels a different conclusion. The statute states that the cost of unusable space shall be allocated under an equal apportionment "among all attaching entities."[164] While the cable operator rate is different, Congress made no indication that it intended to exclude any attaching entity when apportioning the costs of unusable space. On the contrary, the legislative history of the 1996 Act states that all attaching entities should be counted.[165] Congress explicitly provided for a different formula when determining pole attachment rates for cable operators providing cable services, but it made no such provision for the exclusion of those operators in the allocation of costs for unusable space. Moreover,

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[163] Ameritech Comments at 11; Duquesne Light Comments at 39; MCI Comments at 14; Ohio Edison Comments at 37; Union Electric Comments at 34.

[164] 47 U.S.C. § 224(e)(2).

[165] *Conf. Rpt.* at 206.

Section 224(e)(2) does not restrict the use of the term "entities" to those entities that pay rates under Section 224(e).

(2) Pole Owners Providing Telecommunications Services and Incumbent LECs

48. In the *Notice*, the Commission tentatively concluded that, where a pole-owning utility is providing telecommunications services, the utility would also be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e).[166] The Commission also tentatively concluded that an ILEC with attachments on a pole should be counted for the purposes of apportionment of the costs of unusable space. The Commission sought comment on how these two definitions impact its tentative conclusion.[167] The Commission noted that the definition of telecommunications carrier under Section 224 excludes ILECs, and a pole attachment is defined as any attachment by a cable television system or a provider of telecommunications service.

49. American Electric, et al., oppose counting an ILEC with attachments on the pole because the definition of a telecommunications carrier excludes ILECs and the definition of pole attachments specifically includes only attachments made by telecommunications carriers or cable operators.[168] Inclusion of ILECs in the apportionment of costs of unusable space, they conclude, would improperly extend the scope of Section

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[166] *Notice*, 12 FCC Rcd at 11734, para. 22.

[167] *Id.* at 11735, para. 23.

[168] American Electric, et al., Comments at 41.

224 and contradict Congressional intent.[169] We disagree. The exclusion in Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to the purpose of amended Section 224, to provide an important means of access. ILECs generally possess that access and Congress apparently determined that they do not need the benefits of Section 224.[170] The fundamental precept of the 1996 Act was to enhance competition, and the amendments to Section 224, like many of the amendments to the 1996 Act,[171] are directed to new entrants.[172] In contrast, Section 224(e), which delineates a new means to allocate costs, does not refer to "telecommunications carriers," but to "attaching entities."[173] Moreover, the term pole attachment is defined in terms of attachments by a "provider of telecommunications service" not as an attachment by a "telecommunications carrier."[174] The Conference Report confirms that Congress concluded that the unusable space "is of equal benefit to all entities attaching to the pole" and intended that the associated costs be apportioned "equally among all such attachments."[175] We thus think the statute draws a clear distinction between those entities that may invoke Section 224 and those entities that count for purposes of allocating the costs of unusable space.[176]

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[169] *Id.*

[170] *See, e.g.*, Section 224(f)(1) (requiring utilities to afford telecommunications carriers non-discriminatory access).

[171] *See Conf. Rpt* at 113 ("Preamble to the 1996 Act").

[172] *Local Competition Order*, 11 FCC Rcd at 15543, para. 83.

[173] 47 U.S.C. § 224(e).

[174] 47 U.S.C. § 224(a)(4).

[175] *Conf. Rpt.* at 206.

[176] 47 U.S.C. § 224.

50. We affirm our tentative conclusion that any pole owner providing telecommunications services, including an ILEC, should be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e)(2).[177] This includes pole owners that use only a part of their physical plant capacity to provide these services and is consistent with our recognition that pole attachments are defined in terms of attachments by a "provider of telecommunication service." Section 224(e)(2) states that the costs of unusable space shall be allocated on the basis of "all attaching entities."[178] There is no indication from the statutory language or legislative history that any particular attaching entity should not be counted.

51. We also believe this conclusion is supported by Section 224(g) which requires that a utility providing telecommunications services impute to its costs of providing service an amount equal to the rate for which it would be liable under Section 224.[179] This section

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[177] *See* Adelphia, et al., Comments at 6; AT&T Comments at 9; AT&T Reply at 9; Comcast, et al., Reply at 12; KMC Telecom Comments at 6; MCI Comments at 12; NCTA Comments at 17-18; Summit Comments at 2-3; U S West Comments at 5-6. *But see* American Electric, et al., Comments at 41 (the definition of a telecommunications carrier excludes incumbent ILECs and the definition of pole attachments specifically includes only attachments made by telecommunications carriers or cable operator).

[178] 47 U.S.C. § 224(e)(2).

[179] 47 U.S.C. § 224(g) states:

> A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

reflects Congress' recognition that as a provider of telecommunications services, a pole owner uses and benefits from the unusable space in the same way as the other attaching entities. Section 224(g) also directs the utility to impute the costs relating to these services to the appropriate affiliate, making clear that another entity is using the facility and should be counted as an attaching entity. We will count any pole owner providing telecommunications services, including an ILEC, as an attaching entity for the purpose of allocating costs of unusable space.

(3) Government Attachments

52. The *Notice* proposed that government entities with attachments, like other entities present on the utility pole, be counted as entities on the pole for purposes of allocating the costs of unusable space. A utility may be required under its franchise or statutory authorization to provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. Often the responsible government agency does not directly pay for the attachment. The Commission proposed that, since the government agency is using space on the pole, its attachments be counted for purposes of allocating the cost of unusable space. This cost would be borne by the pole owner, since it relates to a responsibility under its franchise or statutory authorization.

53. Some cable operators and telecommunications carriers agree with our proposal to count as a separate attaching entity government agencies that have

attachments to the pole.[180] Utility pole owners and other telecommunications carriers disagree, stating that the utilities would be responsible for a cost that should be shared by all users of the pole because all parties benefit from the existence of the pole as allowed by the government.[181] Since the agencies do not pay fees to the pole owner, the commenters continue, the utility must unfairly absorb the government agency's share of the cost of unusable space, in addition to the one-third share of the cost for which the pole owner is automatically liable. Still other utility pole owners disagree, asserting that government attachments are not wire attachments, do not provide telecommunications or cable services and are not included in the definition of "pole attachment."[182] In defending its recommendation not to count government attachments, ICG Communications adds that government attachments are normally installed in the pole's unusable space so as to avoid interference with other parties' use of the pole space.[183]

54. To the extent that government agencies provide cable or telecommunications service, we affirm our

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[180] *See, e.g.*, AT&T Reply at 9 & 12; Comcast, et al., Reply at 12; KMC Telecom Comments at 6; MCI Comments at 12; NCTA Comments at 19.

[181] *See, e.g.*, Ameritech Comments at 12; Dayton Power Comments at 2; Duquesne Light Comments at 42; ICG Communications Comments at 35; New York State Investor Owned Electric Utilities Comments at 22-23; Ohio Edison Comments at 36,40, Reply at 9-11; Union Electric Comments at 33 & 37, Reply at 9-11.

[182] *See, e.g.*, American Electric, et al., Comments at 41-42; Carolina Power, et al., Comments at 5-6; New York State Investor Owned Electric Utilities Comments at 22-23.

[183] *See* ICG Communications Comments at 35.

proposal that they be included in the count of attaching entities for purposes of allocating the cost of unusable space. We will not include government agencies in the count as a separate entity if they only provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. We conclude that, where a government agency's attachment is used to provide cable or telecommunications service, the government attachment can accurately be described as a "pole attachment" within the meaning of Section 224(a)(4) of the 1996 Act.[184] Like a private pole attachment, it benefits equally from the unusable space on the pole and the costs for this benefit are properly placed on the government entity or the pole owner. Since the government attacher and the pole owner have a relationship that benefits both parties, we are not persuaded that the pole owner is unfairly absorbing the cost of the government's telecommunications attachments to the extent the pole owner's franchise so provides. We will not include a government agency with an attachment that does not provide cable or telecommunications service as an entity in the count when apportioning the costs of unusable space because such an attachment is not a "pole attachment" within the meaning of Section 224(a)(4).[185]

(4) Space Occupied on Pole

55. The *Notice* sought information on alternative methodologies to apportion costs of unusable space, such as by allocating to each entity a proportion of the

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[184] 47 U.S.C. § 224(a)(4).

[185] *Id.*

unusable space equal to the proportion of usable space occupied by the entity's attachment.[186] Specifically, the Commission sought comment on an alternate approach that counts any telecommunications carrier as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole. The Commission also asked whether such a methodology is consistent with the statutory requirement in Section 224(e)(2) for equal apportionment among all attaching entities.

56. Based on the record, we reject this alternate proposal. U S West, in opposing the alternate method, argues that if Congress had intended to allocate the costs of unusable space based on space occupied, it would not have distinguished between usable and unusable space.[187] RCN supports the alternative method because, it argues, not all attaching entities benefit to the same degree from the unusable space and those using more space should be allocated more of the costs of unusable space.[188] Similarly, SBC argues that we should consider the amount of space occupied when allocating the costs of unusable space because an attaching entity that occupies two spaces on the pole should be allocated twice as much costs as an attaching entity that only occupies one space.[189]

57. In suggesting the alternative approach that entities using more than one foot be counted as a separate entity for each foot or increment thereof, we sought to ensure that entities be allocated the costs of the unus-

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[186] *Notice*, 12 FCC Rcd at 11735, para. 23.

[187] *See* U S West Comments at 7-8.

[188] RCN Comments at 3-4.

[189] SBC Comments at 24-25.

able space through a means reflecting their relative use. The record does not indicate whether use of more than one foot by an entity will be a pervasive or occasional circumstance. We agree with those parties that state that allocating space in such a manner will add a level of complexity, and not necessarily produce a fairer allocation of the cost of unusable space. We are also convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space "under an equal apportionment of such costs among all attaching entities."[190]

58. As another alternative method to apportioning cost equally, MCI argues that the apportionment of two-thirds of the costs of unusable space should be based on the number of attachments rather than the number of attaching entities.[191] Allocating costs by the number of entities, it argues, would not allocate any unusable space to overlashings and will result in an incentive for "speculative" overlashing by existing attachers. We also will not adopt MCI's proposal to count attachments instead of attaching entities. The record does not demonstrate that overlashing leads to distortion of the allocation of the costs of the pole.

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[190] 47 U.S.C. § 224(e)(2).

[191] MCI Comments at 12.

c. Overlashing

(1) Background

59. Overlashing, whereby a service provider physically ties its wiring to other wiring already secured to the pole, is routinely used to accommodate additional strands of fiber or coaxial cable on existing pole attachments.[192] The Commission sought information in the *Notice* on how each attaching and overlashing entity should be treated for purposes of allocating the costs of unusable and usable space.[193] We observed that each possible "host attachment" may be overlashed with wiring providing other types of services or owned by other types of providers.[194] The Commission also requested that commenters discuss whether and to what extent overlashing facilitates the provision of services other than cable service by cable operators.[195]

60. In addressing overlashing in the cable operator context, the Commission issued a public notice in January 1995 (the "*Overlashing Public Notice*")[196] cautioning

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[192] *See* Comcast, et al., Reply at 8 (cable operators have routinely overlashed for 30 years); NCTA Comments at 5 (overlashing has been a critical component of cable industry's construction strategy for decades).

[193] *Notice*, 12 FCC Rcd at 11732, para. 15.

[194] For example, the utility pole owner, an ILEC, a cable operator, and a telecommunications carrier that already have attachments on the pole may expand their services through overlashing their existing lines, or a third party attachment may overlash any existing attachment, under certain circumstances which we will address in this *Order*.

[195] *Notice*, 12 FCC Rcd at 11732, para. 15.

[196] *Common Carrier Bureau Cautions Owners of Utility Poles*, *Public Notice*, DA 95-35 (January 11, 1995).

owners of utility poles against restricting cable operators from overlashing their own pole attachments with fiber optic cable. The Commission noted the serious anti-competitive effects of preventing cable operators from adding fiber to their systems by overlashing. The Commission believed improper constraints were being placed on cable systems that sought to overlash fiber optic lines to their existing coaxial cable lines in order to build out their facilities. While recognizing concerns regarding engineering specifications and arranging for access and notification in cases of emergencies or modification, the Commission affirmed its commitment to ensure that the growth and development of cable system facilities are not hindered by an unreasonable denial of overlashing by a utility pole owner.[197] Overlashing capability continues to be a facet of a pro-competitive market because it maximizes the usable capacity on a pole.[198]

(2) Discussion

(a) Overlashing One's Own Pole Attachment

61. The 1996 Act ushered in an era of transition from regulation to competition in telecommunications markets. The 1996 Act is grounded in the belief that competition will bring the greatest benefits to consumers and the greatest diversity of telecommunications services to communities. These broad aims include those expressed in Section 1 of the Communications Act, to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-

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[197] *Id.*

[198] *Local Competition Order*, 11 FCC Rcd at 16075, para. 1161.

wide . . . communication service,"[199] and those expressed in the 1996 Act, to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[200] To implement this framework, the 1996 Act made numerous amendments to the Communications Act, including the expansion of Section 224 jurisdiction to pole attachments for telecommunications carriers and expanded access to utility poles for the purposes of providing cable and telecommunications services.[201] As the Commission has made clear, determining whether actions enhance competition requires examining those actions in light of the significant changes to the laws governing the provision of telecommunications services made by the 1996 Act.[202]

62. We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure

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[199] 47 U.S.C. § 151. These goals date to the original passage of the Communications Act of 1934. See H.R. Rep. No. 1918, 73rd Cong., 2d Sess. 1 (1934).

[200] *See* Preamble to 1996 Act.

[201] 1996 Act § 703.

[202] *Memorandum Opinion and Order* (In the Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries), FCC 97-286 (released August 14, 1997) at para. 32, 38.

facilities.[203] We think that overlashing is an important element in promoting the policies of Sections 224 and 257[204] to provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities,[205] and increasing opportunities for competition in the marketplace.[206]

63. Utility pole owners oppose overlashing as an expansion of their obligation to provide for pole attachments and, further, as an unsupervised burden on the poles.[207] Cable operators and telecommunications carriers assert that overlashing is a routine construction practice that has gone on for decades without interference from the pole owners until the utilities

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[203] *See* ICG Communications Comments at 20; NCTA Comments at 7; RCN Comments at 6-7.

[204] Section 257 provides that the Commission shall seek to promote policies that eliminate market entry barriers for small business and others. 47 U.S.C. § 257.

[205] *See* New York Cable Television Assn. Comments at 7-8; NCTA Comments at 6-7.

[206] *See* Preamble to 1996 Act.

[207] *See* American Electric, et al., Comments at 46; Carolina Power, et al., Comments at 8-9; Colorado Springs Utilities Comments at 3; Dayton Power Comments at 1; Duquesne Light Comments at 26-27; Edison Electric/UTC Comments at 11; New York Investor Owned Electric Utilities Comments at 9-10; Ohio Edison Comments at 24-26; SBC Comments at 8-12; Sprint Comments at 2-3; Texas Utilities Comments at 6; Union Electric Comments at 23-24; USTA Comments at 8. *Cf.* Ameritech Comments at 6-7; AT&T Comments at 5; New York Cable Television Assn. Comments at 4-5; Comcast, et al., Comments at 3-4; ICG Communications Comments at 21; MCI Comments at 8; NCTA Comments at 7.

began entering competitive businesses.[208] Some telecommunications carriers urge the Commission to bar utility pole owners from prohibiting overlashing.[209]

64. We have been presented with no persuasive reason to change the Commission's policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge.[210] To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.[211] We note that we have deferred decision on the issue of the effect any increased burden may have on the rate the utility pole owner may charge the host attacher. As stated above, we believe that the *Pole Attachment Fee Notice* rulemaking is a more appropriate forum for resolution of this issue[212] As also stated above, we affirm our current presumptions for the time being. We also do not believe that overlashing is an expansion of a pole owners' obligation. Overlashing has

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[208] *See, e.g.*, Comcast, et al., Comments at 3-5; NCTA Comments at 7; New York Cable Television Assn. Comments at 4-5.

[209] *See, e.g.*, ICG Communications Comments at 21; New York Cable Television Assn. Comments at 4.

[210] *See* AT&T Comments at 6; Comcast, et al., Comments at 3-4, 11; New York Cable Television Assn. Comments at 4-5. *But see* ICG Communications Comments at 20-21.

[211] *See* 47 U.S.C. § 224(f)(2) (permitting a pole owner to deny access for reasons of safety, reliability and generally applicable engineering purposes).

[212] *See* Section IV.A.1. above (Duquesne Light proposes that any presumptions include weight and wind load factors).

been in practice for many years.[213] We believe utility pole owners' concerns are addressed by Section 224's assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.

(b) Third Party Overlashing

65. Telecommunications carriers seeking expeditious means to gain access to poles have begun contracting with existing attaching entities to overlash to existing attachments.[214] In the *Notice*, the Commission inquired whether a third party should be permitted to overlash an existing cable system or telecommunications carrier's attachment without the agreement of the pole owner.[215]

66. As stated above, NCTA reports that it is current practice for cable operators routinely to overlash their existing attachments without specific prior notification to the pole owners outside of provisions for major modification contained in their pole attachment agreements.[216] Attaching entities assert that pole owners can exert a veto to market entry if allowed to restrict overlashing of the pole attachment facilities.[217] Utility pole owners object to overlashing by third parties

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[213] *See* NCTA Comments at 5.

[214] *Local Competition Order*, 11 FCC Rcd at 16075-77, paras. 1161-64.

[215] *Notice*, 12 FCC Rcd at 11732, para. 15.

[216] *See* NCTA Comments at 6.

[217] *See* AT&T Comments at 6; Comcast, et al., Comments at 3-4, 11; New York Cable Television Assn. Comments at 4-8; NCTA Comments at 7.

unless the pole owner is compensated for what they view as an additional infringement on their property, but comment that, if third party overlashing is permitted without additional compensation, pole owners should have notice of the nature and engineering requirements of the overlasher.[218]

67. Utility pole owners assert that overlashed attachments must occupy the same amount of space as the initial attachment, be considered a separate attachment, and that the overlasher should be required to pay the same rate as though it were an initial attaching entity.[219] Cable operator and telecommunications carrier interests voice varying opinions on if and how a third party overlasher should be counted as an attaching entity,[220] indicating that cross interests are at stake

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[218] *See* American Electric, et al., Comments at 46; Bell Atlantic Comments at 2; Dayton Power Comments at 1; Colorado Springs Utilities Comments at 3; GTE Comments at 7; New York State Investor Owned Electric Utilities Comments at 8-9; SBC Comments at 10-12; Sprint Comments at 2-3; USTA Comments at 6-7.

[219] *See, e.g.*, American Electric, et al., Comments at 46-50. Also commenting that an overlashing entity should be considered an original attaching entity were: Colorado Springs Utilities Comments at 2-3; Edison Electric/UTC Comments at 11; New York State Investor Owned Electric Utilities Comments at 9-10; Sprint Comments at 2; Texas Utilities Comments at 6.

[220] *See* Comcast, et al., Comments at 11 (attaching entity will likely charge the telecommunications overlasher a charge to reflect the unusable space so the overlasher would not be a separate attaching entity); KMC Telecom Comments at 7-8 (no separate payment to pole owner); Summit Comments at 2-3 (charging by number of strands on an attachment would be futile, anti-competitive, and ignore the utility's monopoly obligation to operate for the common good). *But see* Bell Atlantic Reply at 21 (consider overlasher an entity for unusable costs); ICG Communications Comments at 21-22 (consider overlasher an entity for unusable

in facilitating competitive access to the pole, minimizing disruption to existing attachments, and reducing pole attachment fees for the existing attachers.[221]

68. The record does not indicate that third party overlashing adds any more burden to the pole than overlashing one's own pole attachment. We do not believe that third party overlashing disadvantages pole owners in either receiving fair compensation or in being able to ensure the integrity of the pole. Facilitating access to the pole is a tangible demonstration of enhancing competitive opportunities in communications.[222] Allowing third party overlashing will also reduce construction disruption (and the expense associated therewith) which would otherwise likely take place by third parties installing new poles and separate attachments. Accordingly, we will allow third party overlashing subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment. Concerns that third party overlashing will increase the burden on the pole can be addressed by compliance with generally accepted engineering practices.

69. We believe that when a host attaching entity allows an overlashing attachment to be installed to its

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space only); NCTA Comments at 19-20 (if a third party conductor is overlashed to the strand, count that as an entity but charge it only a portion of the support space shared); USTA Comments at 7-8 (overlasher should pay host attacher for the unusable space portion but not usable space portion of pole attachment fee).

[221] The more entities that are counted as attaching entities, generally the lower the pole attachment fee for existing attaching entities is.

[222] *See* Preamble to 1996 Act.

own pole attachment by a third party for the purposes of that third party offering and providing cable or telecommunications services to the public, that third party overlashing entity should be classified as a separate attaching entity for purposes of allocating costs of unusable and usable space[223] because Congress indicated that the unusable space was of equal benefit to all attaching entities.[224] In order to implement the allocation of unusable space, the third party overlasher will necessarily need to have some understanding or agreement with the pole owner, and an agreement with the host attaching entity. Commenters assert that overlashing under these circumstances should be classified as a separate attachment.[225] We agree.

(c) Lease and Use of Excess Capacity/Dark Fiber

70. Recent technological advances have made it possible for excess capacity within a fiber optic cable, known as "dark fiber," to be leased from an attaching entity by a third party. Dark fiber consists of the bare capacity and does not involve any of the electronics

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[223] *See* Bell Atlantic Comments at 2-3; Edison Electric/UTC Comments at 14; Carolina Power, et al., Comments at 11; Colorado Springs Utilities Comments at 2-3; Dayton Power Comments at 1; Duquesne Comments at 28; GTE Comments at 7; New York Investor Owned Utilities Comments at 7-9; Ohio Edison Comments at 26; SBC Comments at 18, Reply at 19; Sprint Comments at 2-3; Texas Utilities Comments at 6; Union Electric Comments at 24. *But see* Ameritech Comments at 6-7.

[224] *Conf. Rpt.* at 206.

[225] *See* Bell Atlantic Comments at 2-3; Edison Electric/UTC Comments at 13-14; Carolina Power, et al., Comments at 8-9; GTE at 7; Sprint Comments at 2-3; Texas Utilities Comments at 5. *But see* Ameritech Comments at 6-7.

necessary to transmit or receive signals over that capacity. It thus differs from dim or lit fiber by which the carrier provides some or all of the electronics necessary to power the fiber. The Commission requested comment on whether a third party using dark fiber should be counted as a separate pole attaching entity for purposes of establishing the number of attaching entities on a pole among whom to apportion the costs of unusable space.[26]

71. SBC asserts that the Commission should not address the issue of dark fiber because it is the subject of a remand from the U. S. Court of Appeals for the D.C. Circuit.[27] In *Southwestern Bell*, LECs challenged a series of Commission orders finding that the LECs were offering dark fiber on a common carrier basis and prescribing tariffed rates for the service. The petitioners claimed that the Commission exceeded its jurisdiction because they had offered dark fiber only on an individualized basis, thereby placing this service beyond the Commission's authority over common carrier offerings under Title II of the Communications Act.[28]

72. We believe that our jurisdiction to consider the leasing and use of dark fiber to the extent it is used to provide telecommunications services is consistent with the court's holding in *Southwestern Bell*. The court concluded that the Communications Act delegates broad authority to the Commission to regulate constantly evolving communications facilities that have

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[26] *Notice*, 12 FCC Rcd at 11735, para. 25.

[27] *See* SBC Comments at 12-13 (citing *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994)).

[28] *Southwestern Bell*, 19 F.3d at 1484.

transcended in complexity and power far beyond the specific technologies known to its drafters in 1934.[229] Section 224 gives the Commission the mandate and the jurisdiction to regulate pole attachment rates for facilities over which cable television or telecommunications services are provided, and therefore our consideration of dark fiber in this context is appropriate for this proceeding.

73. There is general consensus among cable operators and telecommunications carriers that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole.[230] Cable operators, telecommunications carriers, and utility pole owners all contend that the use of dark fiber is a pro-competitive, environmentally sound and economical use of existing facilities.[231] We agree and conclude that the leasing of dark fiber by a third party is not an individual pole attachment separate from the host attachment. Such use will not require payment to the pole owner separate from the payment by the host attaching entity.[232] We also agree with cable operators,

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[229] *Id.*

[230] *See* Ameritech Comments at 6; AT&T Comments at 6; Comcast, et al., Comments at 18; ICG Communications Comments at 21; KMC Telecom Comments at 7-8; MCI Comments at 9; NCTA Comments at 7; RCN Comments at 5.

[231] *See, e.g.*, AT&T Comments at 6; Edison Electric/UTC Comments at 13, Reply at 15; GTE Comments at 7-8; KMC Telecom Comments at 7-8; NCTA Comments at 7; New York Cable Television Assn., Comments at 7-8; New York Investor Owned Electric Utilities Comments at 11; U S West Comments at 10.

[232] *See* AT&T Comments at 6; New York Cable Television Assn. Comments at 7-8; Edison Electric/UTC Comments at 13; GTE Comments at 7; ICG Communications Comments at 17-19;

telecommunications carriers, and utility pole owners[233] that, if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e), consistent with our discussion regarding restrictions on services provided over pole attachments.[234]

d. Presumptive Average Number of Attaching Entities

74. The Commission presently uses rebuttable presumptions in the context of establishing reasonable pole attachment rates. These presumptions help to reduce reporting requirements and record-keeping, and are more efficient so there is less administrative burden on all parties. The use of presumptions provides a level of predictability and efficiency in calculating the appropriate rate. Fairness is preserved because the presumptions may be overcome through contrary evidence. We seek to maintain predictability, efficiency and fairness in determining the costs of unusable space on a pole. In the *Notice*, the Commission stated that a pole-by-pole inventory of the number of entities on each pole would be too costly. The Commission proposed

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KMC Telecom Comments at 7-8; MCI Comments at 6; NCTA Comments at 7; RCN Comments at 5; U S West Comments at 10.

[233] *See, e.g.*, Colorado Springs Utilities Comments at 3; Duquesne Light Comments at 29; Edison Electric/UTC Comments at 13; GTE Comments at 7; NCTA Reply at 12; New York Cable Television Assn., Comments at 7-8; SBC Reply at 6; USTA Reply at 15. *But see* AT&T Comments at 5-6; Comcast, et al., Comments at 18; Sprint Reply at 2-6.

[234] *See* Section IV.A.2 above.

that each utility develop, through the information it possesses, a presumptive average number of attachers on one of its poles. The Commission also proposed that telecommunications carriers be provided the methodology and information underlying a utility's presumption. The *Notice* sought comment on this proposal and on whether any parameters should be established in developing the presumptive average. The *Notice* also sought comment on whether a utility should develop averages for areas that share similar characteristics relating to pole attachments and whether different presumptions should exist for urban, suburban, and rural areas. The *Notice* sought comment on the criteria to develop and evaluate any presumption.[235]

75. The Commission asked whether, as an alternative to pole-by-pole inventory by the facility owners, the Commission should determine the average number of attachments. The Commission inquired as to whether it should initiate a survey to develop a rebuttable presumption regarding the number of attachments. The Commission also sought comment on the difficulties of administering a survey, any additional data required, and parameters of accuracy and reliability required for fair rate determination.[236]

76. Generally, commenters agree with the idea that a presumptive average number of attachers should be developed, but disagree on how this should be accomplished. The utilities generally support developing their own average as the most efficient method.[237]

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[235] *Notice*, 12 FCC Rcd at 11735, para. 26.

[236] *Id.* at 11735, para. 27.

[237] *See* American Electric, et al., Comments at 44; Ameritech Comments at 13; Edison Electric/UTC Comments at 24; Carolina

Several attaching entities support the Commission's development of the presumptive average and encourage the establishment of a rebuttable presumption of at least three attachers.[238] Comcast, et al., in particular, encourages a presumptive average of six attaching entities as supported by the Commission's Fiber Deployment Update End of Year 1996 ("*Fiber Deployment Update*").[239] U S West indicates that having the Commission develop the presumptive average will serve efficiency, minimize complaints, and place the burden of rebuttal on the pole owner.[240]

77. We believe that the most efficient and expeditious manner to calculate a presumptive number of attaching entities is for each utility to develop its own presumptive average number of attaching entities. Utilities not only possess this information but have familiarity and expertise to structure it properly. Based on the record, we think the alternative of the Commission undertaking a survey is too cumbersome and would not necessarily enhance accuracy. We do not believe that the *Fiber Deployment Update* is an appropriate resource from which to develop the presumptive average. The *Fiber Deployment Update* presents data about fiber optic facilities and capacity built or used by

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Power, et al., Comments at 7; KMC Telecom Comments at 7; MCI Comments at 15; NCTA Comments at 20; New York State Investor Owned Electric Utilities Comments at 24; USTA Comments at 13.

[238] AT&T Comments at 14; Comcast, et al., Comments at 8-10.

[239] Jonathan Kraushaar, *Fiber Deployment Update - End of Year 1996* released by the Common Carrier Bureau of the Federal Communications Commission on August 29, 1997 ("*Fiber Deployment Update*"); *see also* Comcast, et al., Comments at 8-10.

[240] U S West Comments at 9 n.25.

interexchange carriers, Bell operating companies, and other LECs and competitive access providers. These data are inadequate for the purposes of creating a presumptive average number of attaching entities because it does not include data pertaining to cable operators. Our decision providing that the utility will establish a presumptive number of attaching entities is also premised on the information developed reflecting where the service is being provided, instead of a broad national average. We think there will be a range of presumptive averages depending on rural, urban, or urbanized areas. To ensure that rates are appropriately representative, each utility shall determine a presumptive average for its rural, urban, and urbanized service areas as defined by the United States Census Bureau.

78. We will require each utility to develop, through the information it possesses, a presumptive average number of attaching entities on its poles based on location (urban, rural, urbanized) and based upon our discussion herein regarding the counting of attaching entities for allocating the costs of unusable space. A utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information by which a utility's presumption was determined. We expect a good faith effort by a utility in establishing its presumption and updating it when a change is necessitated. For example, when a new attaching entity has a substantial impact on the number of attaching entities, the utility's presumptive average should be modified. This method should be consistent with present practice, as we understand most pole attachment agreements "provide for periodic field surveys, generally once every three to seven years, to

determine which entities have attached what facilities to whose poles."[241]

79. Challenges to the presumptive average number of attaching entities by the telecommunications carrier or cable operator may be made in the same manner as challenges presently are undertaken. The challenging party will initially be required to identify and calculate the number of attachments on the poles and submit to the utility what it believes to be an appropriate average. Where the number of poles is large, and complete inspection impractical, a statistically sound survey should be submitted. The pole owner will be afforded an opportunity to justify the presumption. Where a presumption is successfully challenged, the resulting figure will be deemed to be the number of attaching entities.

5. Allocating the Cost of Usable Space

a. Background

80. Section 224(e)(3) provides that a utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.[242] The Commission has defined usable space as the space on the utility pole above the minimum grade level[243] that is usable for the attachment of wires, cable, and related equipment.[244] In the

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[241] ICG Communications at 37.

[242] 47 U.S.C. § 224(e)(3).

[243] In this context, minimum grade level generally refers to ground level or elevation above which distances are measured for determining required clearances.

[244] 47 C.F.R. § 1.402(c).

Second Report and Order,[245] the Commission considered comment regarding the amount of usable space for various size poles in different service areas. The Commission subsequently adopted a rebuttable presumption that a pole contains 13.5 feet of usable space.[246] The usable space presumption has been contested in complaint proceedings before the Commission.[247] In 1986, the Commission revisited the usable space issue and upheld the presumption.[248] In 1997, the Commission sought comment on the presumptive amount of usable space in the *Pole Attachment Fee Notice*.[249] In the *Notice*, we sought comment on the usable space presumption to establish a full record for attachments made by telecommunications carriers under the 1996 Act.[250] The Commission also proposed to modify the current methodology to reflect only the cost associated with usable space to arrive at a factor for apportioning the costs of usable space for telecommunications carriers under Section 224(e)(3).[251] For allocating the costs of usable space to telecommuni-

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[245] 72 FCC 2d 59.

[246] *Id.* at 69; *Third Report and Order*, 77 FCC 2d at 191-193.

[247] *See, e.g., Cable Information Services, Inc. v. Appalachian Power Co.*, 81 FCC 2d 383 (1980); *Television Cable Service, Inc. v. Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

[248] *Pole Attachment Order*, 2 FCC Rcd 4387.

[249] *Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, para. 18.

[250] *Notice*, 12 FCC Rcd at 11733, para. 17.

[251] *Id.* at 11737, para. 33.

cations carriers, the following basic formula was proposed:

$$\text{Unusable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Usable Space}}{\text{Pole Height}}$$

$$\times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

81. In the *Notice*, the Commission sought comment on the amount of usable space occupied by telecommunications carriers and on whether the presumptive one foot used for cable attachments should be applicable to telecommunications carriers generally.[252] Currently, each attaching entity is presumed to use a specific amount of space, and costs are allocated on the proportion of this space to the overall costs of the usable space. The *1977 Senate Report* evidenced Congress' intent that cable television providers be responsible for 12 inches of usable space on a pole, including actual space on a pole plus clearance space.[253] In 1979, the Commission established the rebuttable presumption that a cable television attachment occupies one foot.[254] The Commission subsequently refined its methodology for determining the amount of usable space and made the one foot presumption permanent.[255] The Commission found this result to be consistent with the legislative history of Section 224, as expressed in the *1977 Senate Report*.[256]

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[252] *Id.* at 11733, para. 19.

[253] *1997 Senate Report* at 20.

[254] *Second Report and Order*, 72 FCC 2d at 69-70.

[255] *Id.*, *see also Usable Space Order* at para. 10.

[256] *Usable Space Order* at para. 10.

82. Determining the presumptive amount of usable space attributable to each attacher directly impacts the allocation of costs. Section 224(d)(1), which predates the 1996 Act, specifies that the maximum just and reasonable pole rate shall be determined by multiplying the percentage of the total usable space that is occupied by the pole attachment by the sum of the operating expenses and actual capital costs attributable to the entire pole.[257] Each factor is individually determinable, and in some cases has been assigned a presumptive average value for purposes of resolving complaints in an expeditious manner. The current pole attachment rate methodology consists of a usable space factor that is the result of dividing the space occupied on the pole, or the presumptive one foot assigned to a cable attachment, by 13.5 feet or the total amount of usable space.[258]

b. Discussion

(1) Applying the 13.5 Foot Presumption and the One Foot Presumption to Telecommunications Carriers

83. The law provides a method for the allocation of costs associated with the usable space. We believe that the information we received in this proceeding regarding calculation of usable space is more appropriately addressed in the *Pole Attachment Fee Notice* proceeding and we will thus reserve our decision on the

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[257] 47 U.S.C. § 224(d)(1).

[258] *See Notice*, 12 FCC Rcd at 11736, para. 29. The current methodology is represented by the following formula:

Maximum Rate	=	Space Occupied by Attachment / Total Usable Space	X	Net Cost of Bare Pole	Carrying Charge Rate

total amount of usable space issue until the resolution of that proceeding. For the present time, the presumption that a pole contains 13.5 feet of usable space will remain applicable. We adopt our proposed methodology to apportion the cost of the usable space. We believe this formula most accurately determines the apportionment of the cost of usable space. As mandated by Congress, it incorporates the principle of apportioning the cost of such space according to the percentage of space required for each entity.

84. The Commission's one foot presumption has been in place since 1979. The Commission initially assigned the one foot presumption to cable television operators based on congressional intent, as expressed in the legislative history of Section 224, that cable television was to be assigned only one foot of space, the electric utilities' use of safety space, and an analysis of replacement costs that utilities impose on cable television companies.[259] The Commission concluded in the *Usable Space Order* that several years of experience in regulating pole attachments had not indicated that cable attachments occupy more space than the one foot of usable space as originally contemplated by Congress.[260] Neither the 1996 Act's amendments to Section 224 nor the record in this proceeding suggest that a different presumption should be applicable to telecommunications carriers. Circumstances that are unique or that clearly warrant a departure from the formula may be used to rebut the presumption. We affirm our practice of assigning a presumptive one foot of usable space and find that the presumptive one foot used for

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[259] *Usable Space Order* at para. 10.

[260] *Id.*

cable attachments should be applied to attachments by telecommunications carriers generally. We believe that the one foot presumption remains reasonable and continues to provide an expeditious and equitable method for determining reasonable rates.

85. Some utility pole owners and telecommunications carriers suggest changes to the one foot presumption and express other concerns.[351] Some electric utilities have sought to alter the presumptive amount of usable space allocated when fiber optic cable is involved. For example, Duquesne Light and Ohio Edison contend that, in their service areas, tightly pulled fiber optics will be at the same height at the mid span of the pole as a cable television attachment above it that is hung with the normal required sag.[352] They argue that this is in violation of the NESC code which requires parallel attachments to be separated by appropriate distances between the spans of the poles as well as on

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[351] Adelphia, et al., Comments at 8; Duquesne Light Comments at 35-36; Ohio Edison at 33; New York State Investor Owned Electric Utilities Comments at 5 (one foot presumption found appropriate for span wire attachments occupying no more than one foot of space on the pole, but inappropriate for attachments occupying more than one foot of usable space); New York Cable Television Assn. Comments at 7 (parties with separately stranded attachments occupying their own (one foot) are responsible for their proportionate share of such space, but where facilities are affixed by additional strands, then the party should be responsible for two feet of usable space); RCN Comments at 7-8.

[352] *See* Duquense Light Comments at 35-36; Ohio Edison Comments at 33. *But see* AT&T Comments at 23 (if the fiber optic is properly deployed, the presumption should remain the same for fiber or any other type cable); Comcast, et al., Reply at 20 (such an approach is an attempt to tax and penalize third party fiber deployment).

the poles themselves.[353] Duquesne Light and Ohio Edison further maintain that, because the tensioned fiber optic cable cannot be easily sagged except by cutting and rerunning the cable, the fiber optic cable must be relocated higher on the pole.[354] They recommend that the Commission adopt a rebuttable presumption that fiber optic cable requires, and should be charged for, two feet of usable space to account for the communications companies' practice of pulling fiber optic cables tightly.[355]

86. The impact of deploying fiber optic cable is dependent upon how the fiber is attached. The rebuttable nature of the one foot presumption offers an opportunity for the presentation of information in situations outside of the norm. The record does not contain sufficient information to base a decision on the impact of the practice of pulling fiber optics cable tightly, and therefore we will not presume that fiber optics require two feet of usable space.

87. We disagree with ICG Communications' position that the Commission's one foot presumption is outdated and should be abandoned.[356] ICG Communications maintains that most communications attachments should only be allocated six inches of usable space.[357]

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[353] *See* Duquense Light Comments at 35-36; Ohio Edison Comments at 33.

[354] *Id.*

[355] *Id.*

[356] ICG Communications Comments at 39.

[357] *Id.* (maintaining that overlashed cable combinations below the safety space should be allocated nine inches of usable space); ICG Communications Reply at 22 (if the Commission makes six inches of usable space the basis for Section 224(e) rates, utilities

ICG Communications notes that the NESC does not distinguish between cable used for cable operators and cable used for telecommunications carriers.[268] Based on accepted engineering and governmentally-required standards, it advocates six inches of usable space for simple communications attachments below the safety space.[269] ICG Communications notes that where communications lines have been installed in electric supply space, especially fiber optic cables, more than one foot of usable space is required and an allocation of 16 inches of usable space should be made.[270]

88. Bell Atlantic contends that there is no factual support for ICG Communications' claims.[271] Bell Atlantic points to Bellcore's Manual of Construction procedures as demonstrating that clearance at the pole between communications cables supported on different strands of suspension must be at least 12 inches.[272] SBC maintains that ICG Communications' proposals are based on improper assumptions, especially regarding

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may stop imposing unnecessary make-ready costs on attaching parties and instead increase their pole attachment revenues by permitting more attaching parties on each pole).

[268] *Id.* at 21.

[269] IGG Communications Comments at 40-43 (concluding that a utility should charge a telecommunications carrier for a foot of usable space only upon agreement of the carrier or by establishing that an applicable governmental requirement dictates a one foot clearance between communications lines and suggesting that utilities be permitted to seek different usable space allocations in their negotiation of pole attachment agreements).

[270] *Id.*

[271] Bell Atlantic Reply at 17.

[272] *Id.* (citing Bellcore, Blue Book - Manual of Construction Procedure, § 3.2 (Issue 2 1996)).

overlashing.[273] SBC maintains that the one foot presumption is still valid today.[274] We agree that ICG Communications has not adequately supported its suggested allocation of six inches of space for most communications attachments or 16 inches for fiber optic cables.

89. Adelphia, et al., express concern regarding the validity of assigning the cost of a vertical one-foot of pole space to cable systems and/or other telecommunications providers without considering the horizontal uses of the pole by the pole owner.[275] Adelphia, et al., also suggest that the particular side of the pole on which the attachment is located is of significance.[276] RCN observes that the one foot presumption should not apply where extension arms or boxing[277] is used by the attaching entity to install its facilities.[278] RCN suggests that where extension arms are used, the communications cable is located not on the pole itself, but farther out on the extension arm. RCN states that this will lead to a situation where an entity's physical attachment may occupy as little as six inches of usable space.[279] RCN claims that this configuration will still satisfy the 12-inch clearance required between

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[273] SBC Reply at 26.

[274] *Id.*; *see also* Edison Electric/UTC Comments at 25-26, Reply at 25.

[275] Adelphia, et al., Comments at 8.

[276] *Id.*

[277] RCN describes boxing or "b-bolting" as a process by which an attachment is bolted through the back of a pole, opposite from an existing attachment. RCN Comments at 8.

[278] *Id.* at 7-8. *But see* Comcast, et al., Reply at 20.

[279] RCN Comments at 7-8.

communications attachments, if the cable is positioned a certain distance along the extension.[280]

90. Sufficient record has not been presented to change our presumption as a general matter, although parties are free to challenge the presumption on a case-by-case basis. In striking the proper balance, we must weigh any of the suggested modifications against the advantages of procedures and calculations remaining simple and expeditious.[281] We agree with GTE that changing the usable space presumption would add another layer of complexity to the pole attachment rate formula. As GTE suggests, surveys of the actual space occupied by each attacher would be necessary.[282]

91. We agree with those commenters who have found the presumptive one foot applicable.[283] We further affirm our decision to continue using the current methodology, modified to reflect only costs associated with usable space.[284] Commenters have not persuaded

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[280] *Id.*; *see also* Bell Atlantic Reply at 18 n.43.

[281] *See* 72 FCC 2d at 69 (citing *1977 Senate Report* at 21-22).

[282] GTE Reply at 15.

[283] Carolina Power, et al., Comments at 12-13; GTE Comments at 13, n.29; MCI Comments at 17 (fiber cable and coaxial cable share the same vertical separation requirements in the NESC, therefore there is no need to treat them differently for space allocation purposes); Ameritech Comments at 9 (there are no differences between cable system facility attachments and telecommunications attachments to warrant different presumptions in the formula for the space required for each); NCTA Comments at 13; Adelphia, et al., Comments at 7; U S West Comments at 5.

[284] *Notice*, 12 FCC Rcd at 11737, para. 33 & n.60 (referencing paras. 15-19 regarding comments sought involving the Commission's usable space presumptions); *see also* Carolina Power, et

us that the rationale originally used in assigning the one foot of space to cable television operators should not be equally applicable to telecommunications carriers generally. We continue to see the need and basis for the one foot presumption due to the impracticality of developing sufficient information applicable to all situations.[285] Where use of the one foot presumption would not encourage just and reasonable rates, any party may rebut the presumption.

(2) Overlashing and Dark Fiber

92. Consistent with our above discussion regarding overlashing, we find that the one foot presumption shall continue to apply where an attaching entity has overlashed its own pole attachments.[286] We also determine that facilities overlashed by third parties onto existing pole attachments are presumed to share the presumptive one foot of usable space of the host attachment.[287] To the extent that the overlashing creates an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. We again note that we have deferred decision to the *Pole Attachment Fee Notice* proceeding on the issue of the effect any increased burden may have on the rate the utility pole owner may charge the host attacher. As stated above, we believe that that

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al., Comments at 15 (asserting that the current formula should be used to establish presumptively applicable maximum charges, provided that the formula is further modified for purposes of Section 224(e)); Ameritech Comments at 10; U S West Comments at 5.

[285] *Notice*, 12 FCC Rcd at 11733, para 19.

[286] *See* Section IV.A.

[287] *See* Ohio Edison/Union Electric Reply at 11-13; Edison Electric/UTC Comments at 25; USTA Comments at 7-8.

proceeding is a more appropriate forum for resolution of this issue.[288] As also stated above, we affirm our current presumptions for the time being.

93. Some commenters have suggested that the third party overlasher should be responsible for some portion of the costs associated with overlashing and be responsible for paying a portion of the costs to the pole owner.[289] Carolina Power, et al., argue that because the third party has a statutory right under Section 224(f) to make a separate attachment of its own, overlashing should be left to negotiation.[290] They maintain that the Commission should recognize that each overlashed wire equals a separate attachment for which the overlasher may be charged a just and reasonable rate.[291] KMC Telecom asserts that the allocation of usable space should be one-half to the original attacher and the remaining one-half to the third party overlasher.[292] ICG Communications advocates the allocation of four and one-half inches of usable space to each party when one party overlashes another's cable.[293] MCI recommends sharing the presumptive one foot of space assigned to cable operators' and telecommunications

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[288] *See Section* IV.A.1. above (Duquesne Light proposes that any presumptions include weight and wind load factors).

[289] *See, e.g.*, Duquesne Light Comments at 28. *But see* USTA Comments at 8 and SBC Comments at 9-13 (maintaining that the Commission should not establish any requirements regarding third party overlashing and that an attacher allowing a third party to overlash is sublicensing or sharing space to be occupied by the facilities owned by the third party).

[290] Carolina Power, et al., Comments at 10.

[291] *Id.* at 11.

[292] KMC Telecom Reply at 7-8.

[293] ICG Communications Comments at 21-22.

carriers' pole attachments with overlashers.[294] MCI argues that because overlashing expands usable space, there should be a presumptive number of two overlashings per original attachment as an estimate of the number of overlashings.[295] MCI asks the Commission to further presume that there will be four attachments: one for a cable operator; one for the ILEC; one for an independent competitive LEC; and one for a LEC affiliated with the incumbent electric company.[296] It alleges that if there are four non-electric attachments, and two overlashings per original attachment, the same 6.5 feet of space can presumptively accommodate 12 attachments.[297] Ohio Edison and Union Electric argue that there is no rational basis for adopting such an approach under Section 224(e)(3) because the utility pole owner is entitled to charge the attaching entity for one foot of usable space regardless of whether the original attachment is overlashed.[298]

94. We disagree with these comments suggesting that the Commission must establish the rate and the allocation of cost between the third party overlasher and the host for the use of one foot of usable space. The benefit of third party overlashing as an expeditious means for providers, including new entrants, to gain access to poles would be undermined by such procedures. Unlike the pole owner, the host attaching party generally will not have market power vis-a-vis the

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[294] MCI Comments at 6; MCI CS Docket No. 97-98 Comments at 13.

[295] *Id.*

[296] MCI Comments at 9.

[297] MCI Comments at 10, Table 1.

[298] Ohio Edison/Union Electric Reply at 14-15.

overlasher since the overlasher has a statutory right to make an independent attachment. Accordingly, we conclude that it is reasonable to allow the host attaching entity to negotiate the sharing of costs of usable space with third party overlashers. In such circumstances the host attaching entity will remain responsible to the pole owner for the use of the one foot of usable space but may collect a negotiated share from the third party overlasher. We have already addressed the counting of third party overlashers as a separate entity and established that if such third party provides cable or telecommunications service it will be required to pay its share of the costs of the unusable space. Further, we find that the record in this proceeding is not sufficient to embrace MCI's proposal. While overlashing is frequent, we cannot determine from the record that it is as prevalent as MCI proposes. We are reluctant to conclude that its presumptions are generally applicable. No other party has advocated a similar proposal. Moreover, we see no need to adopt MCI's proposal given our determination that there is no need to regulate the sharing of costs between the host attaching entity and the overlashing entity.

95. Regarding the leasing of dark fiber, to the extent that dark fiber is used to provide a telecommunications service within an existing attachment generally, the majority of commenters do not believe that such activity constitutes a separate attachment under Section 224.[299] As stated above in Section IV.A.4.c., we agree.

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[299] *See, e.g.*, Edison Electric/UTC Reply at 26 (leasing of dark fiber has no impact on the amount of usable space); New York State Investor Owned Electric Utilities Comments at 10; NCTA Comments at 8 (rental of dark fiber is not an attachment).

The one foot presumption is therefore only applicable to the host attacher.

B. Application of Pole Attachment Formula to Telecommunications Carriers

1. Background

96. To implement the 1978 Pole Attachment Act, the Commission developed a methodology and implementing formula to determine a presumptive maximum pole attachment rate.[300] The Commission regulates pole attachment rates by applying this formula ("*Cable Formula*")[301] to disputes between cable operators and utilities. The *Cable Formula* is based on Section 224(d)(1) that stipulates a rate is just and reasonable if it:

> . . . assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum

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[300] 47 U.S.C. § 224(d)(1); 47 C.F.R. §1.1409(c); *see Second Report and Order*, 72 FCC 2d at 67-75, *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, PA 79-0029, 79 FCC 2d 232 (1980); *Continental Cablevision of New Hampshire, Inc. v. Concord Electric Co.*, Mimeo No. 5536 (Com. Car. Bur., July 3, 1985). Under the current methodology, cable operators providing only cable services pay a portion of both usable and unusable space on the pole. The cable cost of the usable space is directly assigned in proportion to the usable space on a pole. The cost of the unusable space is treated as an indirect cost and is assigned in the same manner as direct costs.

[301] 47 U.S.C. §§ 224(b)(1), (d).

> of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.[302]

Currently, application of the *Cable Formula* results in a rate that is in the range between the incremental and fully allocated costs of providing pole attachment space.[303]

97. Section 703(6) of the 1996 Act amended Section 224 by adding a new subsection (d)(3). This amendment expanded the scope of Section 224 by applying the *Cable Formula* to telecommunications carriers in addition to cable systems[304] until a separate methodology is established for telecommunications carriers.[305] We invited further comment on this issue in the *Notice*.[306]

98. Congress directed the Commission to issue a new pole attachment formula under Section 224(e) relating to telecommunications carriers within two

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[302] 47 U.S.C. § 224(d)(1).

[303] In the pole attachment context, incremental costs are those costs that the utility would not have incurred "but for" the pole attachments in question. Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.

[304] 47 U.S.C. § 224(a)(4).

[305] *See* 47 U.S.C. § 224(d)(3) (only to the extent that such carrier is not a party to a pole attachment agreement).

[306] *Notice*, 12 FCC Rcd at 11737, para. 33. In the *Pole Attachment Fee Notice*, the Commission inquired about certain technical changes proposed for the *Cable Formula*. *Pole Attachment Fee Notice*, 12 FCC Rcd 7449, generally. Certain changes, if adopted, may require technical corrections to the *Cable Formula* and new formula. We will examine these issues in the separate rulemaking.

years of the effective date of the 1996 Act, to become effective five years after enactment.[307] In the 1996 Act, Section 224(e)(1) provided:

> The Commission shall . . . prescribe regulations in accordance with this subsection to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[308]

99. In the *Notice*, the Commission proposed to modify the *Cable Formula* to accommodate the two statutory components added by the 1996 Act[309] and to develop a maximum pole attachment rate for telecommunications carriers.[310] These components dictate separate calculations for the equal apportionment of unusable space[311] and the allocation of a percentage of usable space.[312]

100. In paragraphs 41 and 78 above, the Commission affirms its proposals to use certain formulas implementing Section 224(e)(2) and Section 224(e)(3) respectively. The formula for Section 224(e)(2) establishes the unus-

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[307] 47 U.S.C. § 224(e)(1).

[308] 47 U.S.C. § 224(e)(1).

[309] *See* 47 U.S.C. § 224(e)(2), (e)(3).

[310] *Notice*, 12 FCC Rcd at 11737, para. 33.

[311] 47 U.S.C. § 224(e)(2).

[312] 47 U.S.C. § 224(e)(3).

able space factors for telecommunications carriers,[313] premised on an equal apportionment of two-thirds of the costs of providing unusable space on the utility facility.[314] The formula for Section 224(e)(3) establishes the usable space factors for cable operators and telecommunications carriers providing telecommunications services,[315] premised on the percentage of usable space required for the attachment on the utility facility.[316]

101. AT&T observes that there was almost unanimous support from cable operators and telecommunications carriers for the Commission's proposed telecommunications carrier pole attachment rate formula.[317] Several utility pole owners support the Commission's use of its proposed modified formula, but advocate the

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[313] For allocating the cost of unusable space to telecommunications carriers, see discussion at paragraphs 43-44 above for the following basic formula:

$$\text{Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Usable Space}}{\text{Pole Height}} \times \text{Net Cost of Bar Pole} \times \text{Number of Attachers} \times \text{Carrying Charge Rate}$$

[314] See discussion on Unusable Space at Section IV above.

[315] For allocating the cost of usable space for telecommunications carriers, see discussion at paragraphs 80-82 above for the following basic formula:

$$\text{Usable Space} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Total Usable Space} \times \text{Pole Height} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

[316] See discussion on Usable Space at Section IV above.

[317] See AT&T Reply at 15.

use of gross book instead of net book costs.[318] American Electric, et al., advocate that when applied the formula should use forward-looking/replacement costs.[319] Attaching entities urge the Commission to reject the pole owners' call for replacement costs designed to maximize pole attachment rates.[320]

2. Discussion

102. We agree with cable operators and telecommunications carriers that the continued use of a clear formula for the Commission's rate determination is an essential element when parties negotiate for pole attachment rates, terms and conditions.[321] We think that a formula encompassing these statutory directives of how pole owners should be compensated adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the unusable and usable space factors, developed to implement Sections 224(e)(2) and (e)(3), is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers. We affirm the following formula, to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers, including cable operators providing telecommunications

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[318] *See, e.g.*, Bell Atlantic Comments at 4; Colorado Springs Utilities Comments at 4; SBC Comments at 29-30; USTA Comments at 10.

[319] *See* American Electric, et al., CS Docket No. 97-98 Comments at 42-45.

[320] *See, e.g.*, ICG Communications Reply at 26-27, NCTA Reply at 6-8.

[321] *See, e.g.*, USTA Reply at 2; *But see* GTE Reply at 4-5.

services, effective February 8, 2001, encompassing the elements enumerated in the law:

Maximum = Unusable Space Factor + Usable Space Factor Rate

C. Application of Pole Attachment Formula to Conduits

1. Background

103. Conduit systems are structures that provide physical protection for cables and also allow new cables to be added inexpensively along a route, over a long period of time, without having to dig up the streets each time a new cable is placed. Conduit systems are usually multiple-duct structures with standardized duct diameters. The duct diameter is the principal factor for determining the maximum number of cables that can be placed in a duct. Conduit is included in the definition of pole attachments,[322] therefore, the maximum rate for a pole attachment[323] in a conduit for telecommunications carriers must be established through separate allocations relating to unusable space[324] and usable space.[325] In the *Notice*, the Commission sought comment on the differences between conduit owned and/or used by cable operators and telecommunications carriers and conduit owned and/or used by electric or other

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[322] 47 U.S.C. § 224(a)(4).

[323] 47 U.S.C. § 224(e)(1).

[324] 47 U.S.C. § 224(e)(2).

[325] 47 U.S.C. § 224(e)(3).

utilities[326] to determine if there are inherent differences in the safety aspects or limitations between the two which should affect the rate for these facilities as discussed below.[327] The Commission sought comment on the distribution of usable and unusable space within the conduit or duct and how the determination for this space is made.[328] Where conduit is shared, we sought information on the mechanism for establishing a just and reasonable rate.[329]

104. Section 224(e)(2) requires that two-thirds of the cost of the unusable space be apportioned equally among all attaching entities.[330] In the *Notice*, the Commission proposed a methodology to apportion the costs of unusable space among attaching entities.[331] The following formula was proposed as the methodology to determine costs of unusable space in a conduit:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unsable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

In the *Notice*, the Commission also sought comment on what portions of duct or conduit are "unusable" within the terms of the 1996 Act.[332] The Commission proposed

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[326] The issues regarding conduit systems were initially raised by the Commission in the *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at paras. 38-46.

[327] *Notice*, 12 FCC Rcd at 11739, para. 36.

[328] *Id.*

[329] *Id.*

[330] 47 U.S.C. § 224(e)(2).

[331] *Notice*, 12 FCC Rcd at 11740, para. 40.

[332] *Id.*

that a presumptive ratio of usable ducts to maintenance ducts be adopted to establish the amount of unusable space.[333]

105. Section 224(e)(3) states that the cost of providing usable space shall be apportioned according to the percentage of usable space required for the entity using the conduit.[334] Usable space is based on the number of ducts[335] and the diameter of the ducts contained in a conduit.[336] In the *Pole Attachment Fee Notice*,[337] the Commission sought comment on a proposed conduit methodology for use in determining a pole attachment rate for conduit under Section 224(d)(3).[338] In the *Notice*, the Commission sought comment on a proposed half-duct methodology for use in a proposed formula to determine a conduit usable space factor.[339] The proposed usable space formula

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[333] *Id.*

[334] 47 U.S.C. § 224(e)(3).

[335] NESC defines the term "duct" as a single enclosed raceway for conductors or cable. NESC at Section 32.

[336] *Notice*, 12 FCC Rcd at 11739, para. 38.

[337] *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at paras. 43-46.

[338] 47 U.S.C. § 224(d)(3).

[339] *Notice*, 12 FCC Rcd at 11739, para. 38.

under Section 224(e)(3) for pole attachments in conduits is as follows:

$$\text{Conduit Usable Space Factor} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts, less Adjustments for maintenance ducts}} \times$$

$$\text{Net Linear Cost of Usable Conduit Space} \times \text{Carrying Charge Rate}$$

In the *Notice*, the Commission sought comment on the half-duct presumption's applicability to determine usable space and to allocate costs of providing usable space to the telecommunications carrier.[340] The Commission also sought comment on how its proposed conduit methodology impacts determining an appropriate ratio of usable to unusable space within a duct or conduit.[341]

106. As with poles, defining what an attaching entity is and establishing how to calculate the number of attaching entities in conduit is critical. Consistent with the half-duct convention proposed in the *Pole Attachment Fee Notice*,[342] the Commission stated that each entity using one half-duct should be counted as a separate attaching entity.[343] The Commission sought comment on this method of counting attaching entities for the purpose of allocating the cost of the unusable space consistent with Section 224(e).[344] The Commission also

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[340] *Id.* at 11739-40, para. 39.

[341] *Id.* at 11740, para. 40.

[342] *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at para. 45.

[343] *Notice*, 12 FCC Rcd at 11740, para. 41.

[344] *Id.*

sought comment on the use an attaching entity may make of its assigned space, including allowing others to use its dark fiber in the conduit.[345]

2. Discussion

a. Counting Attaching Entities for Purposes of Allocating Cost of Other than Usable Space

107. For the purpose of allocating the cost of unusable space, ICG Communications states that each party that actually installs one or more wires in a duct or duct bank should be counted as a single attaching entity, regardless of the number of cables installed or the amount of duct space occupied.[346] Section 224(e)(2) states that the costs of unusable space shall be allocated ". . . under an equal apportionment of such costs among all attaching entities."[347] We agree that each party that actually installs one or more wires in a duct or duct bank should be counted as a single attaching entity, regardless of the number of cables installed or the amount of duct space occupied. The statutory preference for clarity is preeminent and we perceive no generally applicable method that does not involve complexity and confusion other than counting each entity within the conduit system as a separate attaching entity.

b. Unusable Space in a Conduit System

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[345] *Id.*

[346] *See* ICG Communications Comments at 55; *see also* Edison Electric/UTC Comments at 29. *But see* Ameritech Comments at 15.

[347] 47 U.S.C. § 224(e)(2).

108. Carolina Power, et al., assert that the only usable space is the duct itself, because the surrounding structure and supportive infrastructure of the duct is the unusable space.[348] To allocate the cost of the unusable space, they argue that two-thirds of the costs involved in constructing a conduit system should be apportioned among attaching entities.[349] These utility conduit owners reason that the structure surrounding a conduit system exists to make other parts of the system usable in the same way that unusable portions of a pole exist to make other parts of the pole usable.[350]

109. USTA argues that although unusable conduit space differs from unusable pole space in the way it is created, it is possible to allocate the costs of unusable space.[351] According to USTA, space in a conduit is unusable because it either is reserved for maintenance or has deteriorated.[352] The record demonstrates that in some conduit systems not all of the ducts are used; one duct may simply be unoccupied or another may be reserved for maintenance.[353] We conclude that if a maintenance duct is reserved for the benefit of all conduit occupants, such reservation renders that duct

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[348] Carolina Power, et al., Comments at 16; *see also* American Electric, et al., Comments at 53.

[349] These costs typically include obtaining permits, excavating rock, shoring trench sides and treating subsurfaces. Carolina Power, et al., Reply at 6.

[350] Carolina Power, et al., Comments at 16; *see also* American Electric, et al., Comments at 53.

[351] *See* USTA Comments at 4-5.

[352] USTA Comments at 4-5.

[353] *See, e.g.*, Bell Atlantic Comments at 8; GTE Comments at 14; Carolina Power, et al., Reply at 6; Edison Electric/UTC Reply at 28.

unusable and the costs of that space should be allocated to those who benefit from it. To the degree space in a conduit is reserved for a maintenance or emergency circumstances, but not generally used, it should be considered unusable space and its costs allocated appropriately as entities using the conduit benefit by the space.

110. Commenters representive of all industries suggest that no unusable space exists in a conduit system.[354] We disagree. There appear to be two aspects to the unusable space within conduit systems. First, there is that space involved in the construction of the system, without which there would be no usable space.[355] Second, there is that space within the system which may be unusable after the system is constructed. We agree with Carolina Power, et al., that the costs for the construction of the system, which allow the creation of the usable space, should be part of the unusable space allocated among attaching entities.[356] We also agree with USTA[357] to the extent that maintenance ducts

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[354] Ameritech Comments at 14; AT&T Comments at 16 (even ducts reserved for maintenance and/or emergency purposes are used at times and therefore serve an ongoing purpose); Bell Atlantic Comments at 8; Comcast, et al., Comments at 22-23; Edison Electric/UTC Comments at 29. *But see* Carolina Power, et al., Comments at 16; ICG Communications Comments at 53-54; USTA Comments at 4-5.

[355] This space would include the level down to which one must go in order to lay the system, much like one must go up on a pole to reach the usable space there. The costs associated with creating this portion of space may generally include trenching, excavation, supporting structures, concrete, and backfilling.

[356] Carolina Power, et al., Reply at 6-10.

[357] USTA Comments at 4-5.

reserved for the benefit and use of all attaching entities should be considered unusable.[358]

111. With regard to space in a conduit that is deteriorated, the record is less clear. If a duct has deteriorated beyond usability, USTA believes it should be counted in the unusable space category and therefore included in allocation of costs for unusable space to attachers.[359] We disagree. We are reluctant to require that the costs of space that can not be used by, and provide no benefit to, an existing attaching entity should be allocated beyond the utility conduit owner. In contrast, unusable space on a pole is largely attributed to safety and engineering concerns, adherence to which benefits the pole owner and attaching entities. Space in a conduit that has deteriorated serves no benefit to the existing rate-paying attaching entities. Deteriorated duct creates space that has been rendered unused by the utility. If such space could, with reasonable effort

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[358] As we explained in the *Pole Attachment Fee Notice* at para 45:

> [i]f a utility reserves one duct for maintenance, and if the attacher has the right to utilize that reserved space in the event of a cable break or benefits in any way from the reservation of that space, that reserved duct would be considered unusable space. In that event, it is necessary to include an 'adjustment for reserved ducts' element in the formula to reduce the average number of ducts in the denominator of the occupied space component of the formula. The adjustment for reserved ducts element would be the number of reserved ducts that all attachers have the right to use in the event of a cable break or that they otherwise receive benefit from in any other way. If the attacher has no right to use that space or receives no benefit from that duct, we propose that the denominator should not be reduced.

[359] *See* USTA Comments at 4-5.

and expense, be made available, the space is usable and not unusable.

c. Half-Duct Presumption for Determining Usable Conduit Space

112. Certain telecommunications carriers support the proposed half-duct methodology for determining a conduit rate for usable space.[360] Bell Atlantic and GTE agree with the simplicity and efficiency of our proposed formula, while SBC supports its applicability to telecommunications carriers as well as cable operators because it is based on "actual figures and presumptions that attempt to approximate actual figures."[361] GTE estimates that the average conduit consists of four ducts. GTE further indicates that consideration of the variations in duct diameter ". . . would unduly complicate the formula with even more non-public data, resulting in additional pole attachment disputes."[362] SBC states that the half-duct methodology will adjust easily to telecommunications carriers that may use copper facilities that occupy an entire duct.[363]

113. Other telecommunications carriers and some cable operators oppose the use of the half-duct methodology asserting that it creates too large a presumption of usable space, resulting in rates that could result in an unreasonably high pole attachment rate.[364] Sprint,

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[360] Bell Atlantic Comments at 8; GTE Comments at 14; KMC Telecom Comments at 8; SBC Comments at 30.

[361] SBC Comments at 31 (emphasis in original).

[362] GTE Comments at 14.

[363] SBC Comments at 30-31.

[364] AT&T Comments at 22, Reply at 18-19 & 25; ICG Communications Comments at 55, Reply at 21, 24-25; NCTA Comments

on the other hand, opposes the methodology, indicating that due to the likelihood of damaging existing cables, it does not allow another cable through a duct where there are no inner-ducts.[365] Sprint states that once an attacher uses an empty duct, 100% of the space has been effectively used.[366]

114. Electric utilities oppose the half-duct methodology, stating that electric and communications cable cannot share the same duct due to practical and safety concerns as evidenced by the NESC.[367] Generally, the electric utilities state that safety considerations compel differences between electric utility and other conduit systems.[368] American Electric, et al., indicate that underground conduit is often used by the electric utilities solely to hold conductors that carry high voltage electric current.[369] Further, they state that the difference between electric utility conduit systems and other conduit systems makes it impossible to develop a uniform conduit formula that is equally applicable to

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at 25; NCTA CS Docket 97-98 Comments at 39; TCI CS Docket 97-98 Comments at 16; Time Warner Cable CS Docket 97-98 Comments at 28.

[365] The term "inner-duct" generally refers to small diameter pipe or tubing placed inside conventional duct to allow the installation of multiple wires or cables.

[366] Sprint Comments in CS Docket 97-98 at 11.

[367] *See* American Electric, et al., Comments at 54; Duquesne Light Comments at 49-52; Ohio Edison Comments at 47-49; Union Electric Comments at 41-46 (citing NESC Rule 341(A)(6) which states: Supply, control and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility).

[368] American Electric, et al., Comments at 55; Dayton Power Comments at 3; Edison Electric/UTC Reply at 26.

[369] American Electric, et al., Comments at 55-57.

electric and telephone utility conduit systems.[370] NCTA replies that utilities have not demonstrated that sharing of conduits between telecommunications carriers and electric utilities poses significant safety risks.[371] Some electric utilities claim that they do not have the information necessary to apply the formula and that the methodology is inappropriate for the pricing of access to electric utility conduit.[372] Specifically, the electric utilities claim that they cannot "readily determine the number of feet of conduit or the number of ducts deployed or available in their system."[373]

115. We adopt our proposed rebuttable presumption that a cable or telecommunications attacher occupies a half-duct of space in order to determine a reasonable conduit attachment rate. We note that the NESC rule relied on by the electric utilities does not prohibit the sharing of space between electric and communications. Rather, the rule conditions the sharing of such space on the maintenance and operation being performed by the utility.[374] We continue to believe that the half-duct methodology is the "simplest and most reasonable approximation of the actual space occupied by an attacher."[375] This method, patterned after the one used by the Massachusetts Department of Public Utilities

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[370] American Electric, et al., Comments at 55.

[371] NCTA Reply at 23.

[372] American Electric, et al., Comments at 52-53; Edison Electric/UTC Comments at 28.

[373] American Electric, et al., Comments in CS Docket 97-98 at 83.

[374] NESC Rule 341(A)(6) states that: "Supply, control, and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility."

[375] *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at para. 46.

("MDPU"),[376] allows for determining the cost per foot of one duct and then dividing by two instead of actually measuring the duct space occupied. The MDPU finds, and we agree, that this method is reasonable because an attacher's use of a duct does not preclude the use of the other half of the duct so the attacher should not have to pay for the entire duct. In situations where the formula is inappropriate because it has been demonstrated that there are more than two users in the conduit or that one particular attachment occupies the entire duct, so as to preclude another from using the duct, our half-duct presumption can be rebutted. If a new entity is installing an attachment in a previously unoccupied duct, we believe that such entity should be encouraged to place inner-duct prior to placing its wires in the duct.

d. Conduit Pole Attachment Formula

116. We believe that a formula encompassing statutory directives of how utilities should be compensated for the use of conduit adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the conduit unusable and conduit usable space factors, developed to implement Section 224(e)(2)[377] and Section

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[376] *See Greater Media, Inc. v. New England Telephone and Telegraph*, Massachusetts D.P.U. 91-218 (1992).

[377] For allocating the cost of unusable space in a conduit for telecommunications carriers, see discussion at para. 104 above for the following basic formula:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

224(e)(3),[378] is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers in conduit.[379] We adopt the following formula to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers in a conduit system, effective February 8, 2001, encompasses the elements enumerated in the law:

Maximum Conduit Rate Per Net Linear Foot	=	Conduit Unusable Space Factor	+	Conduit Usable Space Factor

D. Rights-of-Way

1. Background

117. The amended Section 224(a)(4) of the Communication Act defines "pole attachment" to include ". . . right-of-way owned or controlled by a utility." The Commission has previously determined that the access and reasonable rate provisions of Section 224 apply where a cable operator or telecommunications carrier seeks to install facilities in a right-of-way but does not intend to make a physical attachment to any

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[378] For allocating the cost of usable space in a conduit for telecommunications carriers, see discussion at para. 105 above for the following basic formula:

Conduit Usable Space Factor	=	1/2	X	1 Duct / Average Number of Ducts, less Adjustments for maintenance ducts	X
Net Linear Cost of Usable Conduit Space			X	Carrying Charge Rate	

[379] 47 U.S.C. § 224(e)(1).

pole, duct or conduit.[380] For example, a utility must provide a requesting cable operator or telecommunications carrier with "non-discriminatory access" to any right-of-way owned or controlled by the utility.[381] An electric utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits and rights-of-way, on a non-discriminatory basis, where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[382]

118. The Commission's proceedings and cases generally have addressed issues involving physical attachments to poles, ducts, or conduits. The *Notice* sought information about the frequency at which rights-of-way rate disputes might arise and the range of circumstances that would be involved.[383] We also asked whether we should adopt a methodology and/or formula to determine a just and reasonable rate, or whether rights-of-way complaints should be addressed on a case-by-case basis.[384] If a methodology were recommended, the Commission requested comment on the elements, including any presumptions, that could be used to calculate the costs relating to usable and unusable space in a right-of-way.

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[380] *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240; 47 U.S.C. § 224(a)(4); *see also* AT&T Comments at 18.

[381] 47 U.S.C. § 224(f)(1).

[382] 47 U.S.C. § 224(f)(2). These considerations were addressed as access issues in the *Local Competition Order*. 11 FCC Rcd at 16058-107, paras. 1119-1240.

[383] *Notice*, 12 FCC Rcd at 11740, para. 42.

[384] *Id.* at 11740, para. 43.

119. Generally, cable and telecommunications carriers urge the Commission to establish a set of guiding principles against which rights-of-way pole attachment complaints would be reviewed to minimize the number of disputes to be resolved through the complaint process.[385] Attaching entity interests assert that, without some form of established methodology or formula, the parties to a pole attachment agreement would be without instruction and the attaching entity would be at the mercy of the right-of-way owner.[386]

2. Discussion

120. The record indicates there have been few instances of attachment to a right-of-way that did not include attachment to a pole, duct or conduit.[387] Comments of cable operators, telecommunications carriers and utility pole owners confirm that there are too many different types of rights-of-way, with different kinds of restrictions placed on the various kinds of rights-of-way, to develop a methodology that would assist a utility and potential attacher in their efforts to arrive at just and reasonable compensation for the attachment.[388] Such restrictions may also vary by state and local laws

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[385] *See* AT&T Comments at 17-18, Reply at 20; Bell Atlantic Reply at 27; MCI Reply at 24-25; NCTA Comments at 27-28; *But see* Winstar Comments at 11-12.

[386] *See* MCI Reply at 24-25; Winstar Reply at 6-7.

[387] *See, e.g.*, American Electric, et al. Comments at 65; Ameritech Comments at 15-16; Carolina Power, et al., Comments at 16; GTE Comments at 14-15; USTA Comments at 14-15; U S West Comments at 10.

[388] *See, e.g.*, American Electric, et al., Comments at 60; Ameritech Comments at 15; Carolina Power, et al., Comments at 16-17.

of real property, eminent domain, utility, easements, and from underlying property owner to property owner.[389]

121. This *Order*, like the statute and the *Local Competition Order*, sets forth guiding principles to be used in determining what constitutes just, reasonable and nondiscriminatory rates for pole attachments in rights-of-way. The information submitted in this proceeding is not sufficient to enable us to adopt detailed standards that would govern all right-of-way situations. We thus believe it prudent for the Commission to gain experience through case-by-case adjudication to determine whether additional "guiding principles" or presumptions are necessary or appropriate.[390] Therefore, we will address complaints about just, reasonable, and nondiscriminatory pole attachments to a utility's right-of-way on a case-by-case basis.

V. COST ELEMENTS OF THE FORMULA FOR POLES AND CONDUIT

122. Section 224 ensures a utility pole owner just and reasonable compensation for pole attachments made by

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[389] *See, e.g.*, American Electric, et al., Comments at 60; Carolina Power, et al., Comments at 16-17.

[390] Other rights-of-way issues were raised in the comments but are outside the scope of this rulemaking are the subject of petitions of reconsideration, or involve litigation relating to the access provisions of Section 224. *See Gulf Power Co. et al. v. United States*, C.A. No. 3:96 CV 381 (N.D. Fla.) Until such time as the Commission resolves the petitions for reconsideration, or a court issues a decision addressing Section 224's access provisions, the Commission's decisions continue to provide appropriate guidance to both utility pole owners and attaching entities for the purpose of negotiating pole attachments.

telecommunications carriers.[391] When Congress in 1978 directed the Commission to regulate rates for pole attachments used for the provision of cable service, Congress established a zone of reasonableness for such rates, bounded on the lower end by incremental costs[392] and on the upper end by fully allocated costs.[393] In the pole attachment context, incremental costs are those costs that the utility would not have incurred "but for" the pole attachments in question.[394] Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.[395] The Commission has noted that, in arriving at an appropriate rate between these two boundaries, it is important to ensure that the attaching entity is not charged twice for the same costs, once as up-front "make-ready" costs and again for the same costs if they are placed in the corresponding pole line capital account that is used to determine the recurring attachment rate.

123. In regulating pole attachment rates, the Commission implemented a cost methodology premised on historical or embedded costs.[396] These are costs that a firm has incurred in the past for providing a good or service and are recorded for accounting purposes as past operating expenses and depreciation. Many

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[391] 47 U.S.C §§ 224(b), (d)(1), (e)(1).

[392] *1977 Senate Report* at 19; *see also Second Report and Order*, 72 FCC 2d at 4.

[393] *See* 47 U.S.C. § 224(d)(1); *see also 1977 Senate Report* at 19.

[394] *1977 Senate Report* at 19; *see also* 72 FCC 2d at 62.

[395] *1977 Senate Report* at 19-20.

[396] 72 FCC 2d at 66, para. 15

parties in this proceeding, as well as in the *Pole Attachment Fee Notice* proceeding,[397] advocate extension of historical costs, while a number of parties advocate that the Commission adopt a forward-looking economic cost-pricing ("FLEC") methodology for pole attachments.[398] Forward-looking cost methodologies seek to consider the costs that an entity would incur if it were to construct facilities now to provide the good or service at issue.

124. We did not raise the issue of forward looking costs in the *Notice* in this proceeding. While we do not prejudge the arguments raised by the commenters, we decline to address at this time proposals to shift to a forward looking cost methodology. Accordingly, we will continue the use of historical costs in our pole attachment rate methodology, specifically as it is applied to telecommunications carriers and cable operators providing telecommunications services.

VI. IMPLEMENTATION AND EFFECTIVE DATE OF RULES

125. Section 224(e)(4) states that:

> [t]he regulations under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1996. Any increase in the rates for pole attachments that result from the

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[397] NCTA CS Docket No. 97-98 Comments at 3, Reply at 12-19; USTA CS Docket No. 97-98 Reply at 5-6; U S West Comments at 2.

[398] *See* American Electric, et al., Comments at 11-18, CS Docket No. 97-98 Comments at 14-95; Edison Electric/UTC Comments at 8, Reply at 6-7.

> adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.[399]

Because the 1996 Act was enacted on February 8, 1996, Section 224(e)(4) requires the Commission to implement the telecommunications carrier rate methodology beginning February 8, 2001.

126. The Commission proposed that the amount of any rate increase should be phased in at the beginning of the five years, with one-fifth of the total rate increase added each year. The *Notice* sought comment on our proposed five-year phase-in of the telecommunications carrier rate. It also sought comment on any other proposals that would equitably phase in the telecommunications carrier rate within the five years allotted by Section 224(e)(4).[400]

127. Commenters request that the Commission clarify its phase-in requirement by specifying when the first phase-in increase is to begin or when the first annual increment should go into effect. USTA notes an ambiguity regarding the Commission's proposal that the increment be added to the rate in each of the subsequent five years.[401] USTA's concern is that the Commission's proposal gives the impression that the phase in would not occur until after the first full year Section 224(e)(4) applies, or February 8, 2002. MCI requests that the Commission clarify that the five-year phase-in pertains to any rate increase resulting from

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[399] 47 U.S.C. § 224(e)(4).

[400] *Notice*, 12 FCC Rcd at 11741, para. 44.

[401] USTA Comments at 15.

the absorption of unusable costs by telecommunications carriers. It asks that the Commission affirm that Congress intended only rate increases to be phased in and not rate changes or reductions.[402] New York State Investor Owned Electric Utilities offer a plan to implement the phase-in whereby the billing rate would be calculated by applying 1/5, 2/5, 3/5, and 4/5 of the difference between the current Section 224(d)(3) rate and the new Section 224(e) rate calculated each year and adding that amount to the incremental Section 224(d)(3) rate.[403]

128. SBC further recommends that the Commission provide explicit procedures for this phase-in in order to avoid disputes over interpretation of Section 224(e)(4)'s requirement.[404] It recommends that the amount of the increase be calculated based on the data available in the previous year, the year 2000, and that the amount of the increase not be recalculated during the five year phase-in. SBC requests that a full share be added in 2001, even though the carrier rate is not effective until February 8, 2001, and that after the fifth year, for the year 2006, rates be calculated in accordance with the carrier formula, including any changes in data through the end of the five year period.

129. We conclude that the statutory language is explicit in requiring that any increase in the rates for pole attachments shall be phased-in in equal annual increments over five years beginning on the effective

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[402] MCI Comments at 23.

[403] New York State Investor Owned Electric Utilities Comments at 27.

[404] SBC Comments at 35-36.

date of such regulations.[405] We clarify that the language "beginning on the effective date of such regulations" refers to February 8, 2001, or five years after the enactment of the 1996 Act. We find New York State Investor Owned Electric Utilities' plan to implement the phase-in consistent with the Commission's requirement that the increases be phased-in in equal increments over five years, with the goal to have the entire amount of the increase implemented within five years of February 8, 2001.[406]

130. We affirm that the five-year phase-in is to apply to rate increases only and that the amount of the increase or the difference between the Section 224(d) rate and the 224(e) rate shall be applied annually until the full amount of the increase is absorbed within five years of February 8, 2001.[407] Rate reductions are not subject to the phase-in and are to be implemented immediately.

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[405] *See* Carolina Power, et al., Comments at 17; GTE Comments at 15; and Edison Electric/UTC Comments at 31.

[406] For example, if a telecommunications provider pays a Section 224(d)(3) rate on February 7, 2001 of $5.00 per pole and application of the new formula pursuant to Section 224(e) produces a rate of $7.00 per pole, the difference or increase of $2.00 per pole would be applied in five annual increments of $0.40 (or 20%) until the full amount of the increase is reached in the year 2005. The rate per pole for each year should be as follows:

Beginning February 8, 2001	$5.40
Beginning February 8, 2002	$5.80
Beginning February 8, 2003	$6.20
Beginning February 8, 2004	$6.60
Beginning February 8, 2005	$7.00

[407] *See Conf. Rpt.* at 99.

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

131. As required by the Regulatory Flexibility Act ("RFA"),[408] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice*.[409] The Commission sought written public comment on the proposals in the *Notice* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[410]

1. Need for, and Objectives of, the *Order*

132. Section 703 of the 1996 Act requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services. The objectives of the rules adopted herein are, consistent with the 1996 Act, to promote competition and the expansion of telecommunications services and to reduce barriers to entry into the telecommunications market by ensuring that charges for pole attachments are just, reasonable and nondiscriminatory.

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[408] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[409] *Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725, 11741-51, paras. 45-74 (1997).

[410] *See* 5 U.S.C. § 604.

2. Summary of Significant Issues Raised by Public Comments In Response to the IRFA

133. No comments submitted in response to the *Notice* were specifically identified by the commenters as being in response to the IRFA contained in the *Notice*. Small Cable Business Association ("SCBA") filed comments in response to the IRFA contained in the *Pole Attachment Fee Notice*, and, to the extent they are relevant to the issues in this proceeding, we incorporate them herein by reference. SCBA claims in its IRFA comments that, because of the statutory exclusion of cooperatives from the definition of utility, Section 224 does not minimize market entry barriers for small cable operators.[411] According to SCBA, the IRFA in the *Pole Attachment Fee Notice* fails to consider this issue.[412]

3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

134. The RFA generally defines a "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[413] In addition, the term "small business" has the same meaning as the term small business concern under the Small Business Act.[414] A "small business

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411 SCBA IRFA Comments in CS Docket No. 97-98 at 2.

412 *Id.*

413 5 U.S.C. § 601(6).

414 5 U.S.C. § 601(3) (incorporating by reference the definitions of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for

concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[415] For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

a. Utilities

135. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of utility companies. Section 224 defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." The SBA has provided the Commission with a list of utility firms which may be effected by this rulemaking. Based upon the SBA's list, the Commission concludes that all of the following types of utility firms may be affected by the Commission's implementation of Section 224.

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public comment, establishes one or more 'definitions' of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

[415] Small Business Act, 15 U.S.C. § 632.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

136. *Electric Services (SIC 4911).* The SBA has developed a definition for small electric utility firms.[416] The Census Bureau reports that a total of 1379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992.[417] The Census Bureau reports that 447 of the 1379 firms listed had total revenues below five million dollars.[418]

137. *Electric and Other Services Combined (SIC 4931).* The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.[419] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.[420] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars.[421]

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[416] Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987).

[417] 13 C.F.R. § 121.201.

[418] U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA).

[419] *See supra* note 416.

[420] 13 C.F.R. § 121.201.

[421] *See supra* note 418.

138. *Combination Utilities, Not Elsewhere Classified (SIC 4939).* The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified.[422] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did not exceed five million dollars in 1992.[423] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.[424]

(2) Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

139. *Natural Gas Transmission (SIC 4922).* The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[425] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992.[426] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars.[427]

140. *Natural Gas Transmission and Distribution (SIC 4923).* The SBA has classified this entity as a utility that transmits and distributes natural gas for

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[422] *See supra* note 416.

[423] 13 C.F.R. § 121.201.

[424] *See supra* note 418.

[425] *See supra* note 416.

[426] 13 C.F.R. § 121.201.

[427] *See supra* note 418.

sale.[428] The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributer is a firm whose gross revenues did not exceed five million dollars.[429] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars.[430]

141. *Natural Gas Distribution (SIC 4924).* The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.[431] The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues did not exceed five million dollars in 1992.[432] The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars.[433]

142. *Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925).* The SBA has classified this entity as a utility that engages in the manufacturing and/or distribution of the sale of gas. These mixtures may include natural gas.[434] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed,

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[428] *See supra* note 416.

[429] 13 C.F.R. § 121.201.

[430] *See supra* note 418.

[431] *See supra* note 416.

[432] 13 C.F.R. § 121.201.

[433] *See supra* note 418.

[434] *See supra* note 416.

manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues did not exceed five million dollars in 1992.[435] The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars.[436]

143. *Gas and Other Services Combined (SIC 4932).* The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.[437] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.[438] The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars.[439]

(3) Water Supply (SIC 4941)

144. The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.[440] The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues did not exceed five million dollars in 1992.[441] The Census Bureau reported that 3065 of the 3169

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[435] 13 C.F.R. § 121.201.

[436] *See supra* note 418.

[437] *See supra* note 416.

[438] 13 C.F.R. § 121.201.

[439] *See supra* note 418.

[440] *See supra* note 416.

[441] 13 C.F.R. § 121.201.

firms listed had total revenues below five million dollars.[442]

(4) Sanitary Systems (SIC 4952, 4953 & 4959)

145. *Sewerage Systems (SIC 4952).* The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.[443] The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.[444] The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars.[445]

146. *Refuse Systems (SIC 4953).* The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."[446] The Census Bureau reports that a total of 2287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues did not exceed six million dollars.[447] The Census Bureau reported that 1908 of the

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[442] *See supra* note 418.

[443] *See supra* note 416.

[444] 13 C.F.R. § 121.201.

[445] *See supra* note 418.

[446] *See supra* note 416.

[447] 13 C.F.R. § 121.201.

2287 firms listed had total revenues below six million dollars.[448]

147. *Sanitary Services, Not Elsewhere Classified (SIC 4959).* The SBA defines these firms as engaged in sanitary services.[449] The Census Bureau reports that a total of 1214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firms gross revenues did not exceed five million dollars.[450] The Census Bureau reported that 1173 of the 1214 firms listed had total revenues below five million dollars.[451]

(5) Steam and Air Conditioning Supply (SIC 4961)

148. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.[452] The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues did not exceed nine million dollars.[453] The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars.[454]

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[448] *See supra* note 418.

[449] *See supra* note 416.

[450] 13 C.F.R. § 121.201.

[451] *See supra* note 418.

[452] *See supra* note 416.

[453] 13 C.F.R. § 121.201.

[454] *See supra* note 418.

(6) Irrigation Systems (SIC 4971)

149. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.[455] The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues did not exceed five million dollars.[456] The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars.[457]

b. Telephone Companies (SIC 4813)

150. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies. The SBA has defined a small business for SIC code 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it has no more than 1500 employees.[458] The Census Bureau reports that, at the end of 1992, there were 3497 firms engaged in providing telephone services, as defined therein, for at least one year.[459] This number contains a variety of different categories of carriers, including local exchange carriers ("LECs"), interexchange carriers ("IXCs"), competitive access providers ("CAPs"), cellular carriers, mobile service

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[455] *See supra* note 416.

[456] 13 C.F.R. § 121.201.

[457] *See supra* note 418.

[458] 13 C.F.R. § 121.201.

[459] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("*1992 Census*").

carriers, operator service providers, pay telephone operators, personal communications service ("PCS") providers, covered SMR providers and resellers. Some of those 3497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[460] We therefore conclude that fewer than 3497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this *Order*. Below, we estimate the potential number of small entity telephone service firms or small incumbent LEC's that may be affected by the rules adopted herein in this service category.

(1) Wireline Carriers and Service Providers

151. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2321 such telephone companies in operation for at least one year at the end of 1992.[461] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1500 persons.[462] Of the 2321 non-radiotelephone companies listed by the Census Bureau, 2295 were reported to have fewer than 1000 employees. Thus, at least 2295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs, or small entities based on these employment statistics. Although some of these carriers

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460 15 U.S.C. § 632(a)(1).

461 *1992 Census, supra* at Firm size 1-123.

462 13 C.F.R. § 121.201.

are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions or rules adopted in this *Order*.

(2) Local Exchange Carriers

152. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813).[463] The most reliable source of information regarding the number of LECs nationwide appears to be the data that the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service ("TRS"). According to "*TRS Worksheet*" data released in November 1997, there are 1371 companies reporting that they categorize themselves as LECs.[464] Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently,

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[463] *Id.*

[464] Federal Communications Commission, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) ("*TRS Worksheet*" data).

we estimate that there are fewer than 1371 small incumbent LECs that may be affected by the rules adopted herein.

(3) Interexchange Carriers

153. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.[465] Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rules adopted in this *Order*.

(4) Competitive Access Providers

154. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone

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[465] *TRS Worksheet.*

(wireless) companies (SIC 4813). The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.[466] Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rules adopted herein.

(5) Cellular Service Carriers

155. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. The *TRS Worksheet* places cellular licensees and Personal Communications Service ("PCS") licensees in one group. According to the most recent data, there are 804 carriers reporting that they categorize themselves as either PCS or cellular

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[466] *Id.* This *TRS Worksheet* category also includes Competitive Local Exchange Carriers ("CLECs").

carriers.[467] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by the decisions and rules adopted in this *Order*.

(6) Mobile Service Carriers

156. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.[468] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may

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[467] *Id.*

[468] *Id.*

be affected by the decisions and rules adopted in this *Order*.

(7) Broadband Personal Communications Services ("PCS") Licensees

157. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[469] These regulations defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.[470] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. A total of 93 small and very small business bidders won approximately 40% of the 1479 licenses for Blocks D, E, and F.[471] However, licenses for blocks C

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[469] *See Report and Order* (Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, FCC 96-278 (1996) at para. 60, 61 FR 33859 (July 1, 1996).

[470] *See Fifth Report and Order* (Implementation of Section 309(j) of the Communications Act—Competitive Bidding), PP Docket No. 93-253, 9 FCC Rcd 5532, 5581-84 (1994).

[471] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released January 14, 1997).

through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules. We note that the *TRS Worksheet* data track PCS licensees in the reporting category "Cellular or Personal Communications Service Carrier." As noted *supra* in the paragraph regarding cellular carriers, according to the most recent data, there are 804 carriers reporting that they place themselves in this category.

(8) Specialized Mobile Radio ("SMR") Licensees

158. Pursuant to 47 C.F.R. §§ 90.814(b)(1) and 90.912(b)(1), the Commission has defined small entity in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a small entity in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[472] The rules adopted in this

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[472] *See Second Order on Reconsideration and Seventh Report and Order* (Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool), PR Docket No. 89-583, 11 FCC Rcd 2639, 2693-702 (1995); *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking* (Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band), PR Docket No. 93-144, 11 FCC Rcd 1463 (1995).

Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities which may be affected by the decisions and rules adopted in this *Order*. We note that the *TRS Worksheet* data track SMR licensees in the reporting category "Paging and Other Mobile Carriers." According to the most recent data, there are 172 carriers, including SMR carriers, reporting that they place themselves in this category.

159. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders that qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of 900 MHz geographic area SMR licensees affected by the rules adopted in this *Order* includes these 60 small entities. The Commission also recently held auctions for the 525 licenses for the upper 200 channels in the 800 MHz SMR band. There were 10 winning bidders that qualified as small entities in that auction. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the rules adopted in this *Order* also includes these 10 small entities. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR

auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1000 employees and that no reliable estimate of the number of prospective 800 MHz licensees for the lower 230 channels can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities that may be affected by the decisions and rules adopted in this *Order*.

(9) Resellers

160. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.[473] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rules adopted in this *Order*.

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[473] *TRS Worksheet*.

c. Wireless (Radiotelephone) Carriers (SIC 4812)

161. Although wireless carriers have not historically affixed their equipment to utility poles, pursuant to the terms of the 1996 Act, such entities are entitled to do so with rates consistent with the Commission's rules discussed herein. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1176 such companies in operation for at least one year at the end of 1992.[474] According to SBA's definition, a small business radiotelephone company is one employing no more than 1500 persons.[475] The Census Bureau also reported that 1164 of those radiotelephone companies had fewer than 1000 employees. Thus, even if all of the remaining 12 companies had more than 1500 employees, there would still be 1164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1164 small entity radiotelephone companies that may be affected by the rules adopted herein.

d. Cable System Operators (SIC 4841)

162. The SBA has developed a definition of small entities for cable and other pay television services, which

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[474] *See 1992 Census supra* at note 460.

[475] 13 C.F.R. § 121.201.

includes all such companies generating less than $11 million in revenue annually.[476] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1423 such cable and other pay television services generating less than $11 million in revenue.[477]

163. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[478] Based on our most recent information, we estimate that there were 1439 cable systems that qualified as small cable system operators at the end of 1995.[479] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable systems. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Order*.

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[476] 13 C.F.R. § 121.201.

[477] *See supra* note 416.

[478] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration* (Implementation of Sections of the 1992 Cable Act: Rate Regulation), 10 FCC Rcd 7393.

[479] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

164. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[480] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[481] Based on available data, we find that the number of cable systems serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable systems under the definition in the Communications Act.

e. Municipalities

165. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."[482] There are 85,006 governmental entities in the United States.[483] This

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[480] 47 U.S.C. § 543(m)(2).

[481] 47 C.F.R. § 76.1403(b).

[482] 5 U.S.C. § 601(5).

[483] United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments.*

number includes such entities as states, counties, cities, utility districts and school districts. We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments pursuant to Section 224(c)(1). Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

166. The rules adopted in this *Order* will require a change in certain recordkeeping requirements. A utility pole owner will now have to maintain specific records relating to the number of attachers for purposes of determining and updating its presumptive average number of attachers for computing the unusable space calculation for the telecommunications carrier rate formula. The utility pole owner may also require the services of an accountant to determine the new telecommunications rate. In addition, our rules adopted herein will require cable operators to notify the pole owner(s) if and when the cable operator begins providing telecommunications services. We sought comment in the *Notice* on whether small entities may be required to hire additional staff and expend additional time and money to comply with the proposals set forth in the *Notice*. In addition, we sought comment as to

whether there will be a disproportionate burden placed on small entities in complying with the proposals set forth in this *Order*.

167. We did not receive any comments asserting that small entities will be required to hire additional staff and expend additional time and money to determine the appropriate rate for telecommunications carriers under our new rules. SCBA was the only commenter to claim that there will be a disproportionate burden placed on small entities. SCBA claims that small cable systems will be particularly hurt by the statutory exemption of cooperatives from the definition of utility because small cable systems often operate in rural areas and therefore necessarily attach their plant to rural telephone and electric cooperatives.[484] We note that SBCA does not appear to be claiming that our rules will disproportionately burden small cable systems, but that where our rules do not apply, small cable system operators will be disproportionately harmed. Because the exemption for cooperatives was set forth by Congress clearly in Section 224(a)(1), the Commission is unable to address SBCA's concerns in this regard. We conclude that our rules will not disproportionately burden small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

168. The 1996 Act requires the Commission to adopt a telecommunications carrier methodology within two years of the enactment of the 1996 Act.[485] We sought comment in the *Notice* on various alternative ways of

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[484] SBCA IRFA Comments in CS Docket No. 97-98 at 2.

[485] *See* Section VI above.

implementing the statutory requirements and any other potential impact of these proposals on small business entities. We sought comment on the implementation of a methodology to ensure just, reasonable and nondiscriminatory pole attachment and conduit rates for telecommunications carriers. We also sought comment on how to develop a rights-of-way rate methodology for telecommunications carriers.

169. In accordance with the RFA, the Commission has endeavored to minimize significant impact on small entities. With regard to our pole attachments complaint process, we rejected a proposal that we establish an amount in controversy as a minimum threshold for filing a complaint because, among other things, it might preclude small entities from obtaining relief from unjust, unreasonable or discriminatory pole attachment rates.[486] We also rejected as too burdensome the suggestion that cable operators be required to certify annually as to whether they are providing telecommunications services.[487] To minimize the burden on utility pole owners, including those that qualify as small entities, and to promote certainty and efficiency in determining the pole attachment rate for telecommunications carriers, we have maintained our formula presumptions, including our one-foot presumption of usable space.[488] We also determined that, as an alternative to requiring utility pole owners to conduct potentially expensive pole-by-pole inventories for the number of attachers on each pole, we would require pole owners to develop, through information it possesses, a pre-

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[486] *See* Section III.B above.

[487] *See* Section IV.A.2 above.

[488] *See* Sections IV.A.1 and IV.A.5 above.

sumptive average number of attachers, based on location (i.e., urban, rural and urbanized).[489]

170. **Report to Congress:** The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

171. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this *Order*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of

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[489] See Section IV.A.4.d. above.

information on the respondents, including the use of automated collection techniques or other forms of information technology.

172. As stated above, written comments by the public on the modified information collection requirements are due 60 days from date of publication of this *Order* in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

IX. ORDERING CLAUSES

173. IT IS ORDERED that, pursuant to Sections 1, 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 224, the Commission's rules are hereby amended as set forth in Appendix A.

174. IT IS FURTHER ORDERED that Section 1.1402 of the Commission's rules, as amended in Appendix A hereto, will become effective 30 days after the date of publication of this *Report and Order* in the Federal Register, and that Sections 1.1403, 1.1404, 1.1409, 1.1417 and 1.1418 of the Commission's rules, as amended in Appendix A hereto, will become effective 140 days after the date of publication of this *Report and Order* in the Federal Register, unless the Commission publishes a notice before that date stating that the Office of Management and Budget ("OMB") has not

approved the information collection requirements contained in the rules.

175. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Revised Rules

Part 1 of title 47 of the Code of Federal Regulations is amended as follows:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Section 1.1402 is amended by revising paragraph (c) and by adding new paragraphs (i), (j), (k), (l) and (m) to read as follows:

Sec. 1.1402 Definitions.

* * * * *

(c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment. With respect to conduit, the term usable space means space within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications services.

* * * * *

(i) The term conduit means a pipe placed in the ground in which cables and/or wires may be installed.

(j) The term conduit system means structures that provide physical protection for cable and/or wires that allow new cables to be added along a route.

(k) The term duct means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term unusable space means the space on a utility pole below the usable space, including the amount required to set the depth of the pole. With respect to conduit, the term unusable space means space involved in the construction of a conduit system, without which there would be no usable space, and maintenance ducts reserved for the benefit of all conduit users.

(m) The term attaching entity includes cable operators, telecommunications carriers, incumbent local exchange carriers, utilities and governmental entities providing cable or telecommunications services.

3. Section 1.1403 is amended by retitling the section and by adding new paragraph (e) to read as follows:

Sec. 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

* * * * *

(e) Cable operators must notify pole owners upon offering telecommunications services.

4. Section 1.1404 is amended to add a new subsection (g)(12) and new paragraphs (h), (i), and (j) to read as follows, and to redesignate old paragraphs (g)(12), (h),

(i), (j) and (k) as (g)(13), (k), (l), (m) and (n), respectively:

Sec. 1.1404 Complaint.

* * * * *

(g) * * * * *

(12) The average amount of unusable space per pole for those poles used for pole attachments (a 24 foot presumption may be used in lieu of actual measurement, but the presumption may be rebutted); and

* * * * *

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(i) With respect to rights-of-way, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(j) If any of the information and data required in paragraphs (g), (h) and (i) of this section is not provided

to the cable television operator or telecommunications carrier by the utility upon reasonable request, the cable television operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (g), (h) or (i) of this section, as applicable, after such reasonable request. A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its FERC Form 1, FCC Form M, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier. The cable television operator or telecommunications carrier, in turn, shall submit these pages with its complaint. If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint.

5. Section 1.1409 is amended by revising paragraph (e) and adding a new paragraph (f) to read as follows:

Sec. 1.1409 Commission consideration of the complaint.

* * * * *

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked,

the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments by cable operators providing cable services. This formula shall also apply to attachments by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

(2) Subject to subsection (f) the following formula shall apply to pole attachments on a pole by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services beginning on February 8, 2001:

$$\text{Maximum Pole Rate} = \text{Unusable Space Factor} + \text{Usable Space Factor}$$

For purposes of this formula, the unusable space factor, as defined under Section 1.1417(b), and the usable space factor, as defined under Section 1.1418(b), shall apply per pole.

(3) Subject to subsection (f) the following formula shall apply to pole attachments within a conduit system beginning on February 8, 2001:

Maximum		Conduit		Conduit
Conduit Rate	=	Unusable Space Factor	+	Usable Space Factor

For purposes of this formula, the conduit unusable space factor, as defined under Section 1.1417(c), and the conduit usable space factor, as defined under Section 1.1418(c), shall apply to each linear foot occupied.

(f) Subsections (e)(2) and (e)(3) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that result from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

6. Section 1.1417 is added to read as follows:

Sec. 1.1417 Allocation of Unusable Space Costs.

(a) A utility shall apportion the cost of providing unusable space on a pole, duct, conduit, or right-of-way so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all entities.

(b) With respect to poles, the following formula shall be used to establish the allocation of unusable space costs on a pole for telecommunications carriers and cable operators providing telecommunications services:

$$\text{Pole Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

All attaching entities shall be counted as separate attaching entities for purposes of apportioning the costs of unusable space.

(c) With respect to conduit, the following formula shall be used to establish the allocation of unusable space costs for telecommunications carriers and cable operators providing telecommunications services within a conduit:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

All attaching entities with lines occupying any portion of a conduit system shall be counted as separate attaching entities for purposes of apportioning the costs of unusable space.

(d) Each utility shall establish a presumptive average number of attachers for each of its rural, urban, and urbanized service areas (as defined by the Bureau of Census of the Department of Commerce).

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

7. Section 1.1418 is added to read as follows:

Sec. 1.1418 Allocation of Usable Space Costs.

(a) A utility shall apportion the amount of usable space among all entities according to the percentage of usable space required by each entity.

(b) With respect to poles, the following formula shall be used to establish the allocation of usable space costs on a pole for telecommunications carriers and cable operators providing telecommunications services:

$$\text{Pole Usable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Usable Space}}{\text{Pole Height}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rage}$$

The presumptive 13.5 feet of usable space may be used in lieu of the actual measurement of the total amount of usable space. The presumptive 37.5 feet of pole height may be used in lieu of the actual measurement of each pole. The presumptive one foot of space occupied by attachment is applicable to both cable operators and telecommunications carriers.

(c) With respect to conduit, the following formula shall be used to establish the allocation of usable space costs within a conduit system:

$$\text{Conduit Usable Space Factor} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts less Adjustments for maintenance ducts}} \times \text{Linear Cost of Usable Conduit Space} \times \text{Carrying Charge Rate}$$

With respect to conduit, an attacher is presumed to occupy one half-duct of usable space.

APPENDIX B

List of Commenters

Note: If no abbreviation appears in parentheses following the full name of the party, the full name is used in this *Order*.

Comments in CS Docket No. 97-151

Adelphia Communications Corp., Arizona Cable Telecommunications Association, Pennsylvania Cable & Telecommunications Association and Suburban Cable TV Co. Inc. (Adelphia, et al.)

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric, et al.)

Ameritech

AT&T Corp. (AT&T)

Bell Atlantic

Cable Television & Telecommunications Association of New York, Inc. (New York Cable Television Assn.)

Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company and

Virginia Power, including North Carolina Power (Carolina Power, et al.)

City of Colorado Springs on behalf of Colorado Springs Utilities (Colorado Springs Utilities)

Comcast Corporation, Charter Communications, Marcus Cable Operating Co., L.P., Rifkin & Associates, Greater Media, Inc., Texas Cable & Telecommunications Association, Cable Telecommunications Association of Maryland, Delaware and District of Columbia and Mid-America Cable TV Association (Comcast, et al.)

Consolidated Edison Company of New York, Inc., Central Hudson Gas & Electric Corporation, Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (New York State Investor Owned Electric Utilities)

Dayton Power and Light Company (Dayton Power)

Duquesne Light Company (Duquesne Light)

Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)

GTE Service Corporation (GTE)

ICG Communications, Inc. (ICG Communications)

KMC Telecom Inc. (KMC Telecom)

MCI Telecommunications Corporation (MCI)

National Cable Television Association (NCTA)

Ohio Edison Company (Ohio Edison)

Omnipoint Communications Inc. (Omnipoint)

RCN Telecom Services, Inc. (RCN)

SBC Communications Inc. (SBC)

Sprint Local Telephone Companies (Sprint)

Summit Communications, Inc. (Summit)

Teligent, L.L.C. (Teligent)

Texas Utilities Electric Company (Texas Utilities)

Union Electric Company (Union Electric)

United States Telephone Association (USTA)

U S West, Inc. (U S West)

Winstar Communications, Inc. (Winstar)

Reply Comments in CS Docket No. 97-151

Adelphia Communications Corp., Arizona Cable Telecommunications Association, Pennsylvania Cable & Telecommunications Association and Suburban Cable TV Co. Inc. (Adelphia, et al.)

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric, et al.)

Ameritech

AT&T Corp. (AT&T)

Bell Atlantic

BellSouth Corporation (BellSouth)

Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company and Virginia Power, including North Carolina Power (Carolina Power, et al.)

Champlain Valley Telecom Inc., Waitsfield-Fayston Telephone Co., Inc., and Waitsfield Cable Television, a Division of Waitsfield-Fayston Telephone Co., Inc. (Champlain Valley Telecom, et al.)

Comcast Cable Communications, Inc., Charter Communications, Marcus Cable Operating Co., L.P., Rifkin & Associates, Greater Media, Inc., Texas Cable & Telecommunications Association, Cable Telecommunications Association of Maryland, Delaware and District of Columbia and Mid-America Cable TV Association (Comcast, et al.)

Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)

GTE Service Corporation (GTE)

ICG Communications, Inc. (ICG Communications)

KMC Telecom Inc. (KMC Telecom)

MCI Telecommunications Corporation (MCI)

National Cable Television Association (NCTA)

Ohio Edison Company and Union Electric Company (Ohio Edison/Union Electric)

Omnipoint Communications Inc. (Omnipoint)

SBC Communications Inc. (SBC)

Small Cable Business Association (SCBA)

Sprint Local Telephone Companies (Sprint)

Teligent, L.L.C. (Teligent)

Texas Utilities Electric Company (Texas Utilities)

United States Telephone Association (USTA)

U S West, Inc. (U S West)

Winstar Communications, Inc. (Winstar)

APPENDIX E

STATUTORY PROVISION

Section 224 of Title 47, United States Code (1994 & Supp. IV 1998), provides:

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this

title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filled with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to

provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discrimina-

tory[1] basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attach-

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[1] So in original. Probably should be "nondiscriminatory".

ment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).